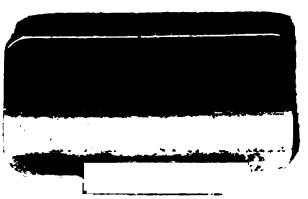

ATLAS ESSAYS

No. 3.

LABOR. THE REPUBLIC.

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PREFACE.

These Essays originally appeared in the pages of the *International Review*, and seem to be worthy of a wider reading in the light of contemporary events. The title *Atlas* is designed to indicate that the Essays are contributed by writers of both hemispheres. As will be seen, the contributors are renowned wherever English is the spoken language.

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LITERARY, BIOGRAPHICAL, AND CRITICAL.

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ESSAY ONE.

THE WORKING CLASSES OF EUROPE.

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Report of the Schultze Delitzsch, Advance and Credit Societies, 1871–2.
Report of the Artisans, Laborers and General Dwellings Co., 1873.
Report of the Working Men's Clubs and Institute Union, 1872–3.

SOME dozen years or more ago a ballad of considerable literary merit was popular amongst the English, on both sides of the Atlantic.—Its title was, "JOHN OF THE SMITHY."—We have not heard or seen it quoted for many years, and probably there is no good reason why its memory should not have faded out of men's minds. But often when we are thinking on that many-sided problem known generally as "the labor question," the lilt of the song comes into our head. It runs

"And the smith complains to the anvil's song,
Complains of the years he has toiled and pined;
For the priest and the ruler are swift to wrong,
And the mills of God are slow to grind.

"But a clear keen voice comes over the sea;
It is piercing the gloom of the waning night;
Time was, time is, and time shall be
When John o' the Smithy shall come by his right—

"And they who have forged the pitiless round
Which has pressed him hard in body and soul,
Shall perish from earth when the grist is ground
And the mighty miller shall claim his toll."

The mills have been turning swiftly enough since that song was written, till the question is no longer whether John o' the Smithy shall get his rights, but whether he will leave any for other folk. The author we believe was an American, though the scene is supposed to be laid in the old world. But if so, and if he intended that the "clear keen voice" which was to declare deliverance, and a brighter day to the working people of Europe, was to come from the west—if he meant by "over the sea" over the Atlantic—he blundered as a seer. The principle of association, which is proving to be the Ithuriel's spear for the poor of Europe, has been of home growth. In several of its developments that principle is not likely for many generations, if ever, to find so congenial a soil in America. Trades' Unionism can never be really formidable in a country where the boundary lines of classes are so indistinct, and which has an inexhaustible supply of rich land for the discontented to fall back upon, though we quite admit, in view of the farmer's Granges in Illinois and Wisconsin, and miner's combinations in Pennsylvania and elsewhere, that the desire to fix the price at which one's own labor shall be sold is just as common in the Great West as in Europe. With respect, on the other hand, to those developments of the principle of Association of which we propose to speak in this Article, there are indications that the employers of labor in the United States are beginning to be even more alive to the power which underlies them than their brethren in England or Germany. It is not however our intention here to compare the progress of Association in Europe and America:—so far as we are aware the materials for any such comparison do not exist at present. We can only deal, and that of necessity very superficially, with some features of the great movement in the old world centres where the need was the sorest until the last few years.

The Reports, of which the titles are prefixed to this Article, indicate four of the most important directions in which, during the last quarter of a century, what Mr. Matthew Arnold would call the *Zeit Geist*, but what we would venture to designate "the Spirit of God in man," has led, and is leading, the great masses of the European population to an era, now we trust not far distant, which, visibly realizing the noble anticipations of the English Poet Laureate, will

"Ring out the strife of rich and poor,
Ring in redress to all mankind."

The generations preceding us, when they turned their attention to that which could promote the general welfare, were mainly occupied with political questions; with matters such as the abolition of the slave trade, of slavery, or serfdom, requiring an alteration of the existing laws; or with matters such as the right of voting in the choice of the law-makers, where admission within the constitutional pale had to be gained for classes previously excluded from it. And it cannot be said that these questions are yet so settled but that they must occupy grave attention in the present, if not in succeeding ages. Witness, e. g., the question of the due representation of minorities, and that of female votes. But the progress made in this respect has been already sufficiently great to show that some action, of a kind distinct from the action of law, is required, before this ancient "feud of rich and poor" can find the peaceful termination which we believe to be in reserve for it. Political Freedom is not unlike Free Trade. It removes a number of artificial, man-made barriers, by which the fertilizing waters of human activity have been directed into particular channels, and prevented from diffusing their benefits generally among mankind; but it leaves us to find out through what channels that diffusion can be made so as to produce the best results. Experience is now daily proving, if it may not be said to have already sufficiently proved, that the let-alone system of unimpeded individual activity, and equal individual rights, in which the reformers of past generations saw the *panacea* for human ills, is no more adequate for its purpose, than a similar system, applied to rivers and brooks, would be sufficient to secure the distribution of natural waters in the way adapted to produce the maximum growth of the plants useful to man. For this end we are bound to have well-arranged plans of drainage and irrigation. Man, as the Bible tells us, has been placed upon the earth "to order it, and to dress it," not less in a moral than in a physical sense. The best and hardest part of his task is the ordering and dressing of the relations naturally existing among the members of his own species, in such manner as may be most conducive to the welfare of the whole body, and of every part, without sacrificing in any respect the well-being either of majorities to minorities, or of minorities to majorities; and he has, in the divine faculty of Reason, the "heir of the ages," which looks behind and before and on all sides to discover the appropriate means for effecting its ends, the instrument fit for the vast, appointed

purpose. The more vivid perception of this truth which has dawned upon the present generation, marks it out as the approximate birth-time of what seems likely to prove an ever growing influence in the history of our race; the practical application, on a large scale, of the principle of Free Association for the purpose of employing the accumulated resources of Industry and Science in the gradual elevation of the mass of our population, by their own combined efforts, into a position of physical enjoyment, intellectual cultivation, and moral dignity.

This birth of practical effort, was preceded in Europe by an age which produced a group of remarkable writers upon the theory of social reform, among whom the names of Saint Simon, Charles Fourier, and Robert Owen, stand out as the most conspicuous leaders—all more or less, the propounders of schemes, justly called Utopian visions, embodying the bright colors of hope, and desire, rather than the sober tints of present possibilities; but yet visions, which, by filling men's imaginations with the notion of a state of general well-being, attainable through their own exertions, without any supernatural, or revolutionary transformation of their existing faculties or circumstances, have prepared the way for the practical attempt to realize that idea, which now brightens our expectations of the future. These have taken the fourfold shape indicated above; of, 1. Unions of consumers or workers to carry on distribution and production on their own account, and thus to apply, for their own benefit, the profits hitherto appropriated by those who have supplied the funds employed for these purposes, and superintended their application; 2. Unions of workers to obtain the capital required for carrying on their work, by their collective responsibility, on terms as advantageous as those hitherto monopolized by the wealthy capitalists, or societies formed by them; 3. Unions of the artisan class to obtain, by the formation of clubs, the social enjoyments and advantages which the wealthier classes have obtained through similar unions; 4. Unions of the same classes to obtain for themselves healthy dwellings in convenient sites, without paying the heavy tax with which they are now burdened in the profits absorbed by speculating builders, or the greed of landlords and middle men. We propose briefly to notice what has been effected in each of these directions.

I. Co-operative Associations, both for production and distribution, have spread themselves all over Europe; existing however in the greatest numbers, in proportion to the population, in some parts of France, and Great Britain; and in the latter country alone having,

up to the present time, been formed upon anything like a definite, progressive plan. This plan has rested on the proposition, that consumption is the ultimate regulator of production, while it is also that which the consumers have in their own hands, and has developed from it the following theses; (1) If the consumers unite in sufficiently large numbers to pay, by the profit upon the articles which they consume, for the cost of distributing them, and provide the funds needed to purchase what they want to consume, they can free themselves from the useless burden of competing establishments set up to live by attracting their custom, and from the countless dangers of fraud and adulteration, which the keenness of the competition so caused, fosters; (2) That by uniting the establishments for self-supply thus created, as they increase in numbers, through wholesale centres, formed by the capital which these establishments furnish, and conducted by managers whom they appoint in their joint interests, they can become the conduit-pipes for supplying the wants of large districts; (3) That they can thus provide a solid support to productive centres, from which these wants may be met, without needing the costly system of competitive rivalry called into operation to fulfil the same office at present. Starting from this basis, Co-operation in the United Kingdom, has grown till it has reached the stage where the distributive associations are beginning to feel themselves strong enough to sustain the productive societies, which should complete their work. The grave questions, attendant upon this phase of combined action,—how progress in improvement can be secured, if the stimulus of competition is withdrawn? how the producing limits are to be knit to the consuming stomach without being swallowed up in, or liable to separation from it?—are commencing seriously to occupy the attention of the working classes, in Lancashire, Yorkshire, the north of England, and Scotland, which are at present the chief seats of Co-operative enterprise, and wait a practical solution still in the womb of the future. Without entering, then, upon any speculations of our own on the way in which this solution can be effected, tempting though that problem be, we would briefly notice three great principles to which the success of Co-operation in Great Britain, appears to be principally due.

The *first* is the rule that all dealings shall be for cash; that the distributive societies shall neither give credit, nor contract debts, except in the shape of loans for definite periods, upon the security of their assets.

The *second* is, that the interest on the capital employed in the

business shall be limited to a moderate fixed rate, so that there shall be no speculative inducement to the formation of a class of investors with an interest in making a profit out of other men's custom; and that the profits shall be divided among the purchasers in proportion to their purchases. With this in England has been generally combined, the provision that the purchaser who is not a shareholder, shall receive only half the dividend he would be entitled to as a shareholder, so that the workman is thus led on to become a member of the Society. The *third* is, that these profits shall be divided from time to time, generally once in every three months, so that their expenditure becomes a question of serious consideration. In consequence they were not exposed to be frittered away, as they certainly would have been, by a class little given before to the practice of saving, had the distributive unions among the working classes been formed upon the principle, since made popular among the richer classes in London by the Civil Service stores, of employing all profits beyond the cost of distribution in a reduction of price upon the articles distributed, while they could always be left on deposit at call in the society, receiving five per cent. interest if applied in paying up the instalments due upon the shares of the purchasers. Of the effect which the system of economics, costing the economizer nothing, has had upon the members of the distributive unions, some idea may be formed from a few anecdotes to be found in Mr. G. J. Holyoake's interesting account of the Great Equitable Pioneers' Society, at Rochdale, in a little book entitled "Self Help by the People." One member, who had lived in a cellar for thirty years, and was never out of debt, one morning astonished his milkman by displaying, with pardonable pride, a £5 note, the first he had ever possessed, and asking for change. Another, a woman, who was told by some enemy of the Store that it would break, replied, "Well, it will break with its own, if it do break, for I have only paid in one shilling, and I have £50 there now." A third, who when he joined the Society had never been out of a shopkeeper's books for forty years, in nine years afterwards had paid as contributions £2 18s. 0d., had drawn out £17 10s. 7d., and had still £5 left. A fourth, whose debt to his shopkeeper during twenty-five years had averaged from 40s. to 50s., and his expenditure 10s. a week, had paid into the Society £2 10s. 0d., drawn out £6 17s. 5d., and had £8 0s. 3d. remaining, as the result of nine years' dealings. A fifth had paid in 15s., and in the course of two years gained £18, of which he had used £11 16s. 11d. only. A sixth, who had generally owed his shop-

keeper from 20s. to 50s., had stored up from nine years' dealings with the Society £3 1s. 10d., out of an average expenditure of 9s. a week, having paid in as contributions £1 18s. 11d., and drawn out £1 12s. 1d. A seventh, a man above sixty, told Mr. Holyoake that had it not been for the store he did not know how he could have lived without going to the workhouse. It had nearly kept him in food by the profits on the goods he had purchased for the last eleven years, during which he had received in dividends £77 2s. 6d., and had still £11 left in the Society. But it is needless to multiply instances. Those already given may suffice, to illustrate the important improvement in the actual condition of members of the working class, even those in the receipt of comparatively small earnings, from the profits upon an expenditure, by no means embracing, at the time to which these statements relate, all their outlay—for the Rochdale Pioneers did not then supply many articles now included in their stock, and had but recently begun to supply others—while they will explain the causes of the growth of Co-operative business and Capital shown by the following figures, extracted from the Report of the Conference at Newcastle, and compiled from the Government returns for the years 1866–7–8, '70, and '71.*

	1866	1867	1868	1870	1871
SOCIETIES REGISTERED AT END OF YEAR.	839	906	956	969	
Of which, had made returns to which the following figures apply.....	436	577	670	749	
Members at end of each year.....	174993	171897	208738	249113	262188
Share capital " "	1046810	1475199	1027776	2084201	2305951
Loan capital " "	118028	136784	184163	197128	215558
Goods paid for during year.....	3892766	5337262	6160406	7457741	
Goods sold during year.....	4462676	6001153	8113072	8202426	9439471
Expenses, including interest, depreciation.	235594	311258	349050	335227	388721
Liabilities, total, at end of year.....		1589245	2027747	2403902	2866318
Assets, " "	1353839	1858616	2155117	2649426	3025567
Cap. inv'd in other societies or companies.			307829	331433	407944
Net profit during year, after payment of interest on capital.....	372307	398578	425542	555435	670721
Declared due to members on purchases..			357380	467164	583290
" " non-members			12676	16523	16248
Appropriated to educational purposes....			3606	3775	5097

The year 1872, so far as its returns are known, shows a similar rate of increase; the sales of 75 of the largest societies which in 1871 were £3720349, having in 1872 reached the total of £5032787; while the number of their members had risen from 77520 to 86234; and their share capital had increased from £895627 to £1129300.†

* Those for 1869 are wanting.

† Co-op. Congress Report, page 119.

In the meantime the advance of the second stage in this organized system of self-help, the Wholesale Centres by which the distributive action of the individual societies may be concentrated, has been not less striking. In 1864 the Co-operative Wholesale Society then called the "North of England Wholesale" commenced its business at Manchester, and effected, during its first complete *half year*, sales to the amount of £45895. In the *three months* ending the 1st July, 1873, the sales were £399011 being an increase of 50 per cent. on the corresponding months for 1872; while 86 new societies had joined it during that quarter,* and this irrespective of the members of an allied society, the "Scottish Wholesale," established at Glasgow, which, in the year 1872, effected sales amounting to £262581, an increase of 61 per cent. on the previous year.†

II. It is time to turn from this picture of the combined efforts of the working classes for their social elevation in Great Britain to the form taken by the same tendency in Germany—the People's Banks, founded in that country at the suggestion, and under the supervision of Mr. Schultze Delitzsch. The present conditions of labor in Germany are very different from those prevalent in Great Britain. In place of the immense establishments, where hundreds of "hands" are employed under the control and for the pecuniary benefit of one gigantic "head," we find, for the most part, a mass of little proprietors, dispersed through a multitude of small towns or villages, working with their own hands upon their own account, with the aid of a few assistants or apprentices, and working under the disadvantage, that their limited means did not allow them to obtain either the materials required in the exercise of their industry, or the capital needed to make it productive, on terms at the command of their wealthier competitors. But what was impossible for the individual, might, thought Mr. Delitzsch, be easy for bodies of these same individuals, combining to offer the security of their collective responsibility.

Out of this idea arose the People's Banks; at first in the form of associations of persons carrying on particular trades, to buy on their joint account the materials which they respectively wanted; but soon taking the shape of institutions by which, to borrow Mr. Schultze Delitzsch's words,‡

"Capital could be created for the classes without capital, and the merely passive saving and depositing in public savings banks, give place to the active participation in a bank business established to supply the credit wants of its members; who by

* Co-operative Wholesale Society Report, July, 1873.

† Letter to R. Kettle, Esq., Co-op. Congress Report for 1872, page 115.

‡ Ibid, page 117.

fulfilling, under difficulties and deprivations, the engagements they had undertaken towards the societies, could prove their own moral worth; while by the accumulation of small savings they succeeded in adding *power* of credit to *worthiness*."

The success of the banks appears to have been materially aided by the confidence created from the unlimited responsibility of their shareholders; a principle to which Mr. Schultze Delitzsch, attaches an importance greater, in our judgment, than really belongs to it, but which no doubt filled a useful office in the introduction of these institutions into Germany. The true secret of their prosperity, is, we believe, to be found in their local character.

The "People's Banks" were not gigantic speculations, carried on from a distant centre, which sought to draw the business of whole provinces into the circle of its operations, but associations dealing with those of whose character and position they were generally well aware, formed of persons who possessed a local knowledge of each other's means; and limited in their operations to advances needed for carrying on the ordinary business of the district where they arose. Hence they made few losses, and, from this circumstance, combined with the prudence shown in their conduct, very much we believe, through the watchful care of Mr. Schultze Delitzsch. He having induced the members:

"To maintain the relation of the deposited reserves and accumulated business dividends to the capital borrowed, for the purpose of strengthening their business funds, at an average even beyond that prescribed by the experience of solid banks of deposit, they have gained a strong hold on the public confidence; so that the offer of capital has exceeded their actual wants; and in some cases disposed them to embark in business operations which more properly belonged to the practice of larger banking concerns; a tendency which Mr. Schultze Delitzsch states that he never failed to oppose."

Hitherto, however, no harm appears to have come to the Associations from this tendency. The facts and figures following will give an idea of the magnitude which the system, introduced in 1853, has attained, and its influence upon the growth of other forms of Cooperative Associations now springing up around it. The war of 1870 taxed their resources severely.*

"Thousands of Co-operators," says Professor Pfeiffer, "were called to join the army, were obliged to leave house and business for many months, and instead of gaining money, were forced to spend their savings; while the productive societies could not sell any more, and orders given before were withdrawn, and payments did

* Co-op. Congress Report for 1872, page 101.

not come in; the money deposited in the banks and stores was withdrawn, and they could not even, with many members who entered the army, insist on the usual notice being given before the withdrawal of money; and this, although they wanted above all to be just to their creditors; yet in the midst of this storm the "People's Banks" held their way."

Aided, no doubt, by the rapid and decided success of the German armies, they survived the panic attending the first few weeks.

"Business," says the Professor, "which had never been entirely suspended was soon resumed to the same extent as before; the demands of the army, probably in a great measure supplying, under another form, the orders it had at first taken away; the banks and stores were able to supply with money their members in the field, and their families, and in the midst of the distractions of the war these members increased, 121 new Co-operative banks, and 112 stores having been opened, and 9 manufacturing societies established."

Institutions which could thus stand the "tug of war" must naturally be expected to thrive still more under the reviving influence of peace. Accordingly the last report of Mr. Schultze Delitzsch shows the following increase in their members, and the business done by them:

	END OF 1870.	END OF 1871.
Credit Banks	1571	2059
Trade Associations	276	404
Distributive Stores	739	827
	2886	3290

Mr. Delitzsch adds that at the date of his report the numbers have risen to nearly 3500; and from the returns received at the Central Office (which, however, were only full in all respects as to 942 associations) he gives the following estimate:

	THALERS.	£ STERLING.
Total business	400,000,000	60,000,000
Cash credits	380,000,000	57,000,000
Capital belonging to members	32,000,000	4,300,000
Loan capital	85,000,000	12,750,000

The total number of members he estimates in like manner at 1,200,000.

Such, in brief outline, has been the operation of the two principal forms of that ladder of systematic association for production and distribution, up which the working classes of Europe are now striving to climb out of the mire where the iron tramp of Capital, competing for profits at their cost, has trodden them down, to that happier stage of existence where this keen competition for profit shall be trans-

formed into a generous emulation for excellence; and the producer shall shake hands in friendly union with the capitalists, in whose ranks he will be included.

The two forms of associations remaining to be noticed are, to a certain extent, anticipations of the flowers and fruits by which this stage of existence will be cheered and adorned. They are instances of the spirit of union directed, either to create common meeting places for bodily recreation or intellectual enjoyment among the working classes, or to import into their houses those appliances for promoting health and comfort which the richer classes have long since learned to consider necessaries of life in their own homes.

III. "The Working Men's Club and Institute Union" has been the practical answer given in Great Britain, to a question which a few years since began to be seriously asked by those social reformers who have striven to help the working classes to help themselves, namely; why should not the working men form on a scale suited to their means, clubs for social purposes, similar to those which we, with our larger means, are accustomed to form for ourselves? why should they be driven to seek, in shops whose proprietors live by tempting them to drink, the only public place where they can meet under shelter to enjoy each other's society? When the tavern was the habitual resort of British gentlemen, they, we know, were noted for habitual excess in drinking. With the introduction of club life, this habit has almost disappeared. Will not similar results follow if similar facilities for obtaining social recreation apart from the civilities of "mine host," are opened to the working classes? And will not these centres of recreative Union, supported as they will naturally be, by the most thoughtful and best conducted men among these classes, insensibly exercise through their influence an elevating action, spreading itself among the whole body, and thus preparing the way for that higher state of social existence to which we hope to see them raise themselves? Such appears to have been the idea out of which the institution abovementioned arose; and though never in the receipt of large funds, it has succeeded in calling forth or encouraging among the working classes the disposition to establish them to such an extent, that there are now known to the Central Association 535 working men's clubs in the United Kingdom, estimated to number 90,000 members,* and supported mainly, in many cases entirely, either by the subscriptions of these members, or by the profits arising from their use of bagatelle or billiard-tables

* Seventy-four new clubs were formed during the last year: but on the other hand, forty-six had been closed.

or the sale of refreshments to them. It is the *self-managing* character accompanying this power of self support, as much as their social objects, which gives to these institutions in our view, their true importance. Help yourselves and God will help you, is a maxim, profoundly true, though sometimes perverted into an implied doubt of that divine help of which it really states only the beneficent condition. Hitherto the mutual help, which the working classes have been inclined to give to each other, has been confined, either to an imperfect application of the principles of life assurance to create common funds for their individual support in sickness or old age; or to the formation of leagues against their employers, for obtaining higher wages, or shorter hours of labor, by stopping the work out of which profits and wages alike are derived—that internal *gouvernement de combat*, where the individual gives himself up into the hands of selected leaders to gain strength by the surrender of liberty, of which, as of military institutions generally, the philanthropist must say, they may be a necessary preservative against worse evils, but it is an evil necessity which makes them necessary. It is the great sign of hopefulness in the present age, that the vast army of those who live by manual labor, who have hitherto combined only to avert general injury by individual sacrifice, should begin to unite for the higher end of securing individual good by general co-operative action.

IV. It is as another phase of this life-bringing principle that we have noticed the "Artisans' and Laborers' Dwelling Company;" because it is, we believe, the first considerable attempt by working people to meet one of the most crying wants of the present day in those overcrowded cities into which the pressure of competition continually drives the larger proportion of the population —the want of healthy and pleasant dwellings for the poorer classes. Societies for improving the dwellings of the workers have existed for the last quarter of a century in Great Britain; where the "Metropolitan Dwelling Association" set an example, followed with greater commercial success by a company founded by Sir Sydney Waterlow, at the moment when we write, Lord Mayor of London, and by other smaller associations. But these societies have been the offspring of the benevolence of the rich, not of self-supplying union among the poor. Individuals, such as the late Mr. Peabody, and the Baroness Burdett-Coutts, have made magnificent donations for the same object; but their operation has been limited to the funds thus nobly provided. They have not called forth, among the class for whom these benefits were designed, any response,

beyond that of letting themselves be benefitted. Cottages have indeed been built, in some cases, by the great Co-operative Societies of the North, for their own members; and the disposition to employ their accumulating funds in this way, appears, we are happy to say, to be growing. But this "Artisans' Dwelling Company" has brought forward a scheme for supplying dwellings, which seems to be now attracting extensive support from the classes who are to live in them, and therefore to be more competent than any of its precursors to contend with that gigantic evil which makes the back lanes and courts of our cities a standing reproach to the self-praised civilization surrounding them. The secret of this greater interest lies, we believe, in the fact that, by the new scheme, the worker can become the *owner* of his own separate dwelling, instead of merely the occupier of rooms let to him, in a block belonging to a company. The societies or individuals mentioned above have striven to bring their buildings to the artisans, and thus were compelled, by the high price of land in the great hives of modern industry, to gain in height the space which they could not afford to use in breadth, and merge the proprietor in the lessee. "The Artisans' and Laborers' Dwelling Company," on the contrary, seek to bring the artisans to the dwellings, which they construct in the neighborhood of the great hives, instead of in their interior, availing themselves of the facilities for locomotion offered by railways and street cars to transport the worker to his work. Naturally this involves some additional cost; but it is a cost compensated by the greater cheapness of his house, the diminution in doctors' bills, and the stoppage of the drain of the public house, produced by the healthier atmosphere in which he and his family live, and the absence of the ever ready temptation offered by the drink shop "round the corner" to spend in his gullet what should be spent on the backs or the brains of his children, or on the comforts of his home. Buildings for the common benefit of the dwellers in these *cités ouvrières* are part of the plan, and the time will probably come when the superior facilities of access to these common advantages, afforded by well-arranged dwellings united under one roof, may induce the classes who are to benefit by them to prefer such domestic clubs, jointly managed by their owners and occupiers, to separate houses. But, till this time arrives, the "Artisans' and Laborers' Dwelling Company" must be congratulated in having set on foot a system which the workers appear inclined to use to solve for themselves that problem of decent and healthy homes, with which the selfish interest of the wealthier classes will

not meddle, and which their benevolence has hitherto proved quite inadequate to effectually supply.

We have no space left to dwell on the prospects which are thus opening in the old countries of Europe for the poor. The time has come when the fact that they have attained their majority is too clear for argument, and the question which is being anxiously asked on all sides is how they are likely to use their power in the national households of which they have become or are fast becoming the strongest members. Those who have watched them most carefully and sympathetically will have little fear in the development of the great drama. It would be vain nevertheless to deny that there is much cause for anxiety. The evil spirits of irreligion and communism which have here and there obtained a strong hold on the class that is rising to power, are hard to cast out. But in England at any rate the perilous time has passed. It is impossible to watch the tone of the numerous congresses and other gatherings which are held in all parts of the country and not to feel that the jealousy of capital, which still exists, has no dangerous side to it. Indeed the danger is rather the other way, and in the co-operative producing societies especially, the best men have to watch carefully in order to ensure that workmen, who are not also shareholders, shall get any portion of the profits resulting from associations. In Germany where communistic doctrines had till lately, and probably still have, a far stronger hold on the artisan class than they have ever had in England, the same healthy influence is at work. One of the ablest of the Liberals in the German Parliament in writing a few weeks since to an English Co-operator stated his own firm belief that if his country be saved from a communistic revolution, as he believed it may be, it would be owing chiefly to the influence of the People's Banks and Working Associations.

The effect of the movement on religion is a deeply interesting study. A large section of the English Co-operators openly profess that their object and hope are to make trade Christian, "to apply in common life, in buying and selling, producing and consuming, the old truths which have commanded the lip service of Christendom for near 2000 years." We incline to think that their numbers and influence are on the increase; and it is difficult in any case to see how a great popular movement which takes for its motto, "self-help through fellowship in work," can fail to strengthen the religious life of a people. But without insisting on this point, we are quite content to put the case no higher than Mr. Mill has done, and to let it rest on his

words. Writing of the Co-operative Movement before it reached anything like its present development, he says,

"It is a change in society, which will combine the freedom and independence of the individual, with the moral, intellectual, and economical advantage of aggregate production; which without violence or spoliation, or any sudden disturbance of existing habits, or expectations, will realize, at all events, in the industrial department, the best aspirations of the democratic spirit."

It is the most beneficial ordering of industrial efforts for the universal good which it is at present possible to devise.

THOMAS HUGHES.

ESSAY TWO.

THE PRICE OF LABOR IN ENGLAND.

AT the present time, trade in England is depressed to a degree almost unexampled in the history of British commerce. As a necessary consequence, the tendency of the rate of wages in the principal manufacturing industries is in a downward direction. All our accumulated experience in the development of productive industry in the age in which we live does but confirm the principles laid down by Adam Smith and the early masters of the science of political economy. "When," as Adam Smith has truly said, "in any country the demand for those who live by wages—laborers, journeymen, servants of every kind—is continually increasing, when every year furnishes employment for a greater number than had been employed the year before, the workmen have no occasion to combine to raise their wages. The scarcity of hands occasions competition among the masters, who bid against each other in order to get workmen, and thus voluntarily break through the natural combination of masters, not to raise wages."

The course of events in the British labor market in 1876, is a striking confirmation of the simple truths, enunciated in 1776, by the author of "The Wealth of Nations."

The same axiomatic principles were set forth in the clearest and most concise form by Mr. Ricardo, in 1817. "Labor," he wrote, "is dear when it is scarce, and cheap when it is plentiful." To these expositions of the simple principles which govern the rate of wages, I can only add the lesson derived by my father from his great experience as an employer, that the best paid workmen are generally the best, and the worst paid the worst.

It might have been expected that these principles would have

been accepted universally; and yet how few employers of labor act as if they had any faith in the accuracy of these deductions from the universal experience of mankind! It was my father's fortunate lot to be among the first who directed their attention to the construction of railways. As the pioneer of the present generation of railway contractors, he undertook large works in every country of Europe, and, Africa excepted, in every quarter of the globe. With such rare opportunities of estimating the relative efficiency of the laborer of many races, and under every vicissitude of climate, the conclusion at which he arrived was this—that the cost of labor was practically the same in all countries. The proportionate cost of skilled and unskilled labor may vary; but where there was no exceptional disturbing cause, as from the sparseness of population in a sterile or an unoccupied region, the cost of labor was in all cases calculated at the same amount, and the soundness of the calculation was borne out everywhere by the result. I must not occupy your readers further with the elementary principles already stated.

In the relations between labor and capital in England, it is satisfactory to observe the gradual abatement of hostile feelings. Among the order of men to whom I belong, the most generous sympathies are cherished toward the working class; and I venture to believe that these sentiments are reciprocated by the majority of the leaders of trades-unions, and by the operatives under their guidance. The solicitude of the employers for the welfare of the working class, has been exhibited in a most practical form, in the recent amendments of the laws relating to trade combinations. The improvements effected are summarized in the following passage, from an article in the *Times* newspaper, quoted in the *Annual Register*. By an Act passed in the session of 1875, "all breaches of contract between masters and workmen cease to be, in the eye of the law, criminal offenses. Damages may be recovered from workmen for breach of contract of service, and the courts may, at the request of defendant, order specific performance of his contract in place of damages, with the alternative of a short term of imprisonment, in default of his new undertaking. But criminal and penal proceedings can no longer be taken."

By another act of the same session, trade combinations ceased to be subject to indictment for conspiracy, except in cases where the objects of the compact were themselves legally punishable. It is now admitted by the warmest advocates of the rights of workmen, that the state of the English law, as it affects the industrial classes, no

longer presents any grievances, of which they have reason to complain.

The most substantial grievance of the British workman is of a nature which can not be removed by legislation. In the United Kingdom, after centuries of active enterprise in the pursuit of commerce, capital has been accumulated in a more ample store, in proportion to the population, than in any other country in the world. The result is that the ordinary rate of interest is lower in England than in any other money market in Europe. The average rates for the year 1875, in the open market, were as follows:

	Average rate of Interest for 1875.
London	3 per cent.
Paris	3½ "
Vienna	4½ "
Berlin	3¾ "
Frankfort	3⅝ "
Amsterdam	3½ "
Brussels	3½ "
Hamburg	3¾ "
St. Petersburg	5¼ "

Money being abundant, and the rate of interest low, outlets for investments are eagerly sought for. It is in London, that foreign countries, in a state of impending bankruptcy, have of late conducted their principal borrowing operations, and their appeals to a credulous and ill-informed public have not been made in vain. If, in any trade or business, whether in commerce or agriculture, in mines or in ships, at home, or in the remotest regions of the earth, a return has been anticipated, ever so little beyond the low nominal rate of interest, eager and credulous people have hitherto been only too easily induced to embark their capital. A large proportion of the annual savings of the country, have thus been squandered away in injudicious speculations; and, even when capital has been attracted to a legitimate trade, if the profits have, for ever so short a time, exceeded what may be called the normal rate of interest, over-production has ensued, and the period of short-lived prosperity has been followed by a long depression. A serious fall in the value of manufactured goods has been inevitable; and the workmen, whose wages have been unduly advanced by excessive demand for their labor in prosperous times, have been compelled to submit to a reduction, or to suffer the more cruel alternative of entire loss of employment.

The recent history of the iron-trade presents a striking illustration

of the course of events, which has here been sketched out. The circular of Mr. Müller, of Middlesborough-on-Tees, quoted in the commercial review for 1875, published in the *Economist*, contains the following passage:—"The year 1875 has been a period of hard struggle in the iron-trade. The crisis has been felt more severely than those of 1857 and 1866, because the iron-trade had not at that time attained "the dimensions it now occupies; nor were former crises preceded by such extraordinary prosperity and inflation, as had been developed during 1871–2 and 1873. In the course of these years, a great amount of capital had found its way into the iron and coal trades, helping to bring up the means of production and manufacture to the level of the exceptional demand then existing, but which could scarcely be expected to continue. When, therefore, this demand slackened, and prices declined, the burden was felt first by undertakings which had been established on the basis of extreme ideas. It is this great and sudden prosperity, which has been so baneful in its effects on all classes of society, from the workmen upwards. When in due time, the tide turns, and the reaction sets in, outside capital begins to be nervous and fidgety, and tries to get out as fast as possible. A wholesome reaction is thereby often magnified into a disastrous crisis—a short epidemic in business, which, while removing much that is weak, injures also much that is worth preserving."

As is well known, a very large proportion of the total quantity of coal raised is consumed in the manufacture of iron. After a long period of depression, the price of iron rose, in 1871, in a degree, which can only be described by quoting the expressions used by Mr. Gladstone in speaking of the general progress of trade, which, he said, had advanced, not by steps, but by strides, not by strides, but by leaps and bounds. In September, 1871, forged pig-iron was selling for fifty shillings, while coke was selling for from ten to twelve shillings a ton. In July, 1872, the forged pig-iron rose to one hundred and twenty shillings, more than double the price of nine months before, and coke, following the advance in iron, rose to from thirty-seven shillings and sixpence to forty-two shillings a ton. These high prices implied a high rate of profit; and forthwith everybody engaged in the iron and coal trades, applied his utmost energies to the increase of production, while new capital for the development of these industries was obtained, with accustomed facility, from the inexperienced investors who abound in an old country. The great pressure thus brought to bear on the labor market naturally caused a rapid advance

of wages. In a colliery with which I am connected, in South Wales, the rise in wages in some of the principal departments is shown in the following table:—

	1863	1869	1873
Hewers	——	24*s.* 5*d.*	48*s.* 9*d.*
Timbermen.	25*s.*	— —	53*s.* 4*d.*
Haulers	——	20*s.*	31*s.* 6*d.*
Landers.	——	21*s.*	36*s.* 9*d.*
Laborers	——	15*s.*	24*s.*
Average for all men employed .	——	20*s.* 11*d.*	36*s.* 8*d.*

It was estimated by Mr. Pease that the cost of getting coal in Durham had increased fifty per cent. between 1870 and 1872; and Mr. Macdonald, the president of the Miners' National Association, estimated that the cost of getting coal in Northumberland had increased, between 1868 and 1872 and 1873, from sixty to sixty-five per cent: though he pointed out that the selling price had increased one hundred and twenty per cent.

Can it be a subject of surprise that such an inflation as this was promptly followed by a corresponding reaction? As prices fell the masters required that the men should accept reduced wages, and a long conflict naturally ensued. The issue was raised in a most conspicuous manner in South Wales, and it may be interesting to record some of the principal incidents of the struggle.

In the years 1871 and 1872 the price of coal had been increased about one hundred per cent. The culminating point was reached in 1873; but, happily for the public, the exceptional rates were not long maintained. The subsequent fall in the value was extremely rapid. Steam-coal fell from twenty-two shillings a ton, in October, 1872, to twelve shillings and sixpence a ton in December, 1874. In May, 1875, the price of coal was only thirty-nine and one-half per cent. higher, while the wages of the men were sixty per cent. higher than in 1870 In 1870, the average wages in the collieries were four shillings and twopence a day. In 1874, the average earnings were six shillings eight and a half pence a day, assuming that an equal quantity of coal was cut. After a prolonged resistance the workmen in South Wales were compelled to surrender. A deduction of wages was fixed at twelve per cent. for three months, and it was agreed that any further change in

the rate should be regulated by a sliding-scale, depending on the selling price of coal. A joint committee of workmen and masters was appointed to prepare a scheme for the proposed sliding-scale.

Thus, after a disastrous struggle, representing a loss in wages to the workmen estimated by Lord Aberdare at three millions sterling, the truth of the doctrine laid down by Adam Smith was once more confirmed. "The condition of the laboring poor is hard in the stationary, and miserable in the declining, state. The progressive state of trade is in reality the cheerful and the hearty state to all the different orders of society. The stationary is dull, the declining melancholy." It can not be too strongly impressed on the intelligent minds of the operative classes that it is only when trade is in a progressive state that wages can be increased. Strikes, in a rising market, are generally successful. Strikes, against a falling market, inevitably terminate in disaster to the workmen.

Another able writer in the *Economist* gives similar testimony to the truth of the great principles laid down in the quotation, cited above, from Adam Smith. "Decreasing employment," he says, "has compelled the adoption of lower wages, and has enabled the employer to obtain more and better work for the money paid than was possible during the exceptional period of 1871–73. Indeed, it must be remembered that our great iron and coal industries have been rendered unprofitable not merely because wages rose inordinately, but because, as the wages rose, the quantity and quality of the work given for more money became less and less. The workshop became, in no small degree, the paradise of negligence and incapacity; evils to be cured only by the sharp physic of privation."

In the finished iron and engineering trades, the workmen have succeeded, within the space of a few years, in reducing the hours of labor to nine a day, and they have obtained a substantial advance of wages. In our own establishment, the Canada Works, at Birkenhead, the hours have been reduced, in accordance with the rule which has come into force universally in the United Kingdom; and the wages have been advanced, since 1871, in the case of the fitters, from five shillings to five shillings and sixpence per day, smiths, from five shillings and fourpence, to six shillings and twopence, platers, from five shillings and sixpence, to six shillings, and other trades in proportion.

Being anxious that the present condition of the iron and coal trades in England, should be impartially exhibited to the readers of the INTERNATIONAL REVIEW, I have asked Mr. Potter, the editor

of the *Bee Hive*, the leading journal on the affairs of our trades-unions, to state the case from his point of view. The following are two letters of great interest, received from him:

MAY 12th, 1876.

"DEAR SIR:—I find it is not easy to obtain the information, as to the wages in the coal and iron trade, you have asked for.

"*First.*—Nearly every district, in which coal is got, differed in amount of wages in 1871, the period when the advances in the coal and iron trades began.

"*Secondly.*—In each district the advances were at different times, and of different amounts.

"*Thirdly.*—The highest amount of wages obtained by the men differed in the different localities.

"*Fourthly.*—Some started from a low level, and attained to a high standard.

"*Fifthly.*—In arbitrating for reductions—and all the arbitrations in the coal trade were for a reduction—the actual wages, either as a starting point, or at any stage of the advance, were scarcely ever mentioned, the percentage of advance and increase being almost the only thing alluded to. This practice, as you will see, fixed nothing, either as a starting point or resting point, over the whole scale, in rising or descending.

"In the coal trade, the highest wages are earned in Northumberland and Yorkshire. Advances in miners' wages began to take place toward the close of 1871. In West Yorkshire the advances were about fifty-nine per cent. on the prices paid in 1871; in South Yorkshire fifty-seven and a half per cent; in Lancashire sixty per cent; while in Cheshire and the Oldham districts, the advances were considerable, more perhaps than one hundred per cent; but the point from which they rose in these districts was very low. In Durham the advances were fifty-seven per cent; in Northumberland fifty-seven per cent. But in Scotland, where wages were very low, the advances reached one hundred and forty per cent. In North Staffordshire the advances were fifty-five per cent. and in Cumberland fifty-four per cent.

"The general reductions have brought wages down in all the coal districts to very near the old level. But it should be borne in mind that, where the coal is used for manufacturing purposes, the wages have been better maintained, as in Yorkshire, and certain parts of Lincolnshire and Derbyshire; while in other districts, where the consumption has been in connection with the iron trade, they have gone

down. There are places, where perhaps fifteen per cent. is yet retained, while in other places there is scarcely anything over the wages of 1871; and, if the increased cost of living be taken into account, the gain all over has not been much, and the downward tendency still continues.

"In this matter it might not be amiss to bear in mind that the miners' unions are of recent date, the greater number having been established within the last five years. They have done a great deal in regard to the general improvement of their condition; but their discipline is by no means perfect, and there is much to be done among them in the work of organization.

"It is also worth noticing that in the trades where the unions have been more perfected, wages have not been affected by the state of trade. The Amalgamated Engineers, the Iron Founders, the Steam Engine Makers, the Iron Ship Builders, and the Boiler Makers, have not been reduced at all. These trades have obtained advantages during the years of briskness of trade, particularly in regard to reduction of hours of work, but nothing has been given up by them, owing to the present slackness of trade.

"I may state that coal-heavers' wages, which are the best of the colliers', will not average more than five shillings per day, while some of the day workers go down to three shillings per day. It should also be borne in mind that miners can not well work more than five days a week.

"It will not be far from the mark if we say that the wages of miners in 1871 were four shillings per day, though in some branches they were much more. What they were at the highest will be seen by the percentages stated in this summary. The following paragraph appears in the *Times* of to-day, which will show the condition of miners' wages in Warwickshire:

"'*The proposed reduction in Warwickshire miners' wages.*—At a mass meeting of Warwickshire miners, held on Wednesday night, at Bedford, the masters' proposition for a reduction in wages was considered. The meeting unanimously passed a resolution to the effect that their present rate of wages is only threepence per day in advance of the rate of 1871, and that their present working hours are as long as those of competing districts. The men therefore hoped the reduction would not be insisted on, it being now impossible for them to procure the common necessaries of life.'"

"The agricultural laborer has, I rejoice to record, shared in the generally improved condition of the laboring classes in England. Until within a recent period, the condition of the rural population in many districts was a dishonor to a country abounding in riches and resources of every kind. The blessings of education and political intelligence had not been extended,—even now they are but partially enjoyed,—among the inhabitants of the secluded villages and hamlets of the agricultural districts. The humble tillers of the soil had no conception of a system of trade-combination. In their complete ignorance of any other condition of life than that which they had inherited from their forefathers, they had no definite aim or plans for the improvement of their lot. They endured their poverty with dogged submission. At length, however, the rural laborer found a powerful and eloquent advocate in the person of Mr. Joseph Arch. By arguments based upon a more or less accurate appreciation of the facts, but, in the main, conclusive, the laborer was urged to ask for an advance of wages. The demands made were not extravagant. In Suffolk, for example, the men asked that their wages should be increased from thirteen to fourteen shillings a week. This modest request was met on the part of the farmers, by the formation of a counter association, and ultimately the laborers throughout an extensive district were locked out.

"The course adopted by the employers was condemned by all impartial and thoughtful men. In one of his characteristic and sensible letters to the *Times*, the Bishop of Manchester stated the case against the farmers in plain and forcible terms. "Could a man," he asked, "at the present prices of the necessaries of life, maintain himself and his family, he would not say in comfort, but even with a sufficiency of food, fuel, and clothing, to enable him to put his whole strength into his work, on a smaller income than fifteen or sixteen shillings a week? If the farmers said they could not afford to pay this rate of wages with their present rentals, and could prove this statement, then rents must come down: an unpleasant thing to contemplate, for those who would spend the rent of a three hundred acre farm on a single ball, or upon a pair of high-stepping carriage-horses. But, nevertheless, one of the things is inevitable."

The farmers succeeded for the time in their resistance to the demands of the laborers. They and their families performed the manual labor on their farm, which had hitherto been carried on by hired workmen. The results, however, of the labor movement in the agricultural class have been considerable. The laborers were defeated

in their pitched battle with the farmers; but they subsequently obtained considerable advances in all those districts of England where the lowest wages had hitherto been given. Space does not permit me to follow up the labor movement in all its ramifications in Dorsetshire and other counties. The actual position of the agricultural labor market is, however, summed up, from a unionist's point of view, in the following letters received from Mr. Joseph Arch, and from Mr. Henry Taylor, the Secretary of the Union of Agricultural Laborers, in reply to an inquiry which I ventured to address to them on behalf of the *International Review*.

"MAY 9, 1876.

"I would say that we have no official statement as to rates of wages in the rural districts, and, in speaking of the rises during the past three years we can only generalize. Having made myself intimately acquainted with the various counties in which our cause exists, I feel justified in saying that at least three shillings per week have been gained on the old wages, prior to this movement. In North Lincolnshire the wages run as high as twenty-one shillings, and, coming southward, they are as low as thirteen and fourteen shillings. In Norfolk, fourteen and fifteen shillings is about the day price for ordinary laborers, some receiving thirteen shillings. Carters obtain more by one shilling, or in some cases two shillings, than ordinary men; but of course their work entails more hours, as well as Sunday duties. Suffolk is about one shilling under Norfolk. Cambridgeshire and Bedfordshire about the same, or tending rather downward. In Wiltshire there are a large number who work for eleven shillings: in fact we have men on strike at present against that wage. Hampshire, about thirteen shillings. Oxfordshire, the same. Warwickshire, from eighteen to thirteen shillings. A few miles' separation often makes a great difference in wages. Of course manufacturing towns, or public works, make the difference frequently. But in other cases there is a difference of one or two shillings, which is simply attributable to the spirit of the men, who, in most cases, are too ignorant to know aught of the labor market, or are altogether too spiritless to move, and otherwise involved in poverty. In most cases where the union is in force, wages are better—other conditions similar—than where there is no union. This can of course be understood. The men are of more courage, become excited to move, have assistance to move, and are directed in their movements. But, migration apart, the men would get better terms if they demanded them; but in many cases they are too timid. This is removing, however. I said

that there had been a rise of three shillings all round. I wish to keep within the mark; but I believe four shillings is nearer truth. And this is not all. The piece-work prices are much improved. They determine the bargain before performing the work, unlike the old custom. And then I am assured that the independence of the men, and the liability of their moving, have caused the employers to be much more cautious and respectful in their attitude to them."

Mr. Taylor inclosed a letter as a sample of the correspondence in which he is hourly engaged, which, omitting names, I give as a typical case.

"MAY 8, 1876.

"DEAR SIR:—We saw in the *English Laborer* that Mr. Miller goes to Canada the twenty-fourth of this month, and that he wishes to take members of the union with him. We gave our names in to our secretary, and thought to go in March. I am working for ten shillings a week, and I hope I shall have the good luck to go, for I am tired of England, for we are half-starved. If the men would all be union men it would be better for all; but they hang back so here, and they that has joined more than half has left the ranks. They say Mr. Arch ought to come among us and cheer them up. I think myself if the speakers was to come often, our branch would soon grow stronger. Dear Sir, I hope you will send by return, and tell me whether it's free emigration, and whether we can be sent free. There are five of us, one boy fourteen and a girl nine, and an older daughter, who is very weakly. She earns her living by sewing. If we are to go, please send the tickets at once, as I have many things to do before we go."

The following is from Mr. Joseph Arch:

"BARFORD, WARWICK, MAY 13, 1876.

"The wages of the farm laborers have been advanced in every county, where our association has gone, from two to three shillings per week, viz:—from nine to twelve shillings, and in some parishes more, say thirteen and fourteen shillings, as in Dorset. In other counties they have risen from ten to thirteen and fourteen shillings, as in Norfolk. In my own county, Warwickshire, the increase has been from eleven to fifteen and sixteen shillings; in Wiltshire, from nine to twelve and thirten shillings; and in Lincolnshire, from twelve to sixteen shillings and sixpence, and eighteen shillings. In other counties, where the power of unionism has been felt, the above-named

wages have been obtained, and, as a rule, retained, employers being only able to effect a reduction where the laborers have been disorganized. It has been computed that four millions sterling more have been paid to the laborers during the last four years, than were paid in the four preceding years. I can not vouch for the statement as correct, because I have not gone into details on that point; but I have every reason to believe that it is true. The increased pay obtained, has brought more comforts to the houses of the laborers than they ever enjoyed before. Better wages have reduced pauperism in the rural districts, the number of paupers being about three hundred and twenty-three thousand less, and the poor rates having fallen from eightpence to threepence half-penny in the pound. At Guildford, Blandford, Warwick, and in every district, where the better pay has been given, the like results have followed—of course in proportion to the intelligence of the county, as the men are better educated in some counties than in others. Take Sussex, where the education of the laborer has just been what the squire and parson have allowed it to be, where any radical publication was denounced as sedition. That despotism has had its day; and I hope, sir, that in the paper you are about to submit to the intelligent Americans, you will not forget to mention that, with increased wages and home comforts, the English laborer has increased in intelligence."

It is necessary, in order to complete this statement, to refer to the situation in which the farmers are placed. While wages have advanced, they have had to contend with the most disastrous seasons within the memory of man. On the 14th of January, 1876, Mr. Clare Sewell Read, M. P. for West Norfolk, made an important speech, which was quoted in the *Economist*. "He and his friends had only a poor crop of corn; their roots were the worst he ever remembered to have seen grown in Norfolk. The hay crop had been exceedingly light, and had been secured in very bad order; and even the straw, which they thought of great value, was so indifferent, that, when it was threshed, it broke all to pieces. When he came to speak of prices, he considered they were ruinously low, having regard to the yield per acre. Prices did not apparently depend upon the amount of corn which was grown in the country, but upon the quantity of the grain which foreigners were pleased to send us, and which would increase, year by year. If the farmers had another year like that of 1875, he fancied they would see even longer and more dolorous faces than those now before them. Farmers might stand one such brunt,

but they could hardly face another. If he were to sell every bushel of corn which he grew in 1875, the proceeds would not much more than pay his labor bill and half his rent; and as he should have to expend a further amount for artificial manures, he would leave the meeting to guess upon which side his banking account would be likely to stand, after he had paid his rent, as he had done that day."

Philanthropic men have sought to reconcile the apparently hopeless conflict between capital and labor, by the introduction of the so-called coöperative system. The nature of the experiment will be too familiar to your readers to make it necessary that a detailed explanation should be given. It will be sufficient to point out where the principle has been adopted with success, and where it has been marked by failure. It has been a success, where the business to be done was easy to manage. At the coöperative retail stores, great reductions of price and improvements of quality have been secured to the consumers. Coöperation has been a failure in its application to productive industry. In a large factory, or mine, or foundry, where the labors of hundreds or thousands of men must be combined, in order to carry out extensive and complicated operations, discipline must be maintained, and the reasonableness of the orders given must be accepted without debate by those engaged in subordinate capacities. The government of a factory, like the command of a regiment, must be an autocracy. Hence it is that the principle of associated effort has been found inapplicable to productive industry.

There is another reason why coöperative manufacture has been a failure. Capital is required for such undertakings. Competition has reduced the profits of manufacturers so considerably, that an establishment, unprovided with the newest and most costly machinery, must show an adverse balance. Unfortunately, the savings of the working classes are not sufficient to enable them to provide the capital necessary for business on a large scale. It would be unfair to the intelligent and industrious working people of England, to ignore the many laudable efforts they have made to raise their material and their social condition. The benefit societies, the post office savings bank, in which the savings of the poor are accumulated at the rate of a million and a half a year, the building societies, and the coöperative associations, attest the prudence and the thrift of multitudes, who can not save money without self-denial. On the other hand, the consumption of spirits and beer in the United Kingdom shows that the surplus earnings of prosperous times are largely consumed in pernicious indulgence. The consumption of British spirits increased

from 24,000,000 gallons, in 1871, to 30,100,000 gallons, in 1874, while the number of bushels of malt consumed was increased in the same period from 54,000,000 to 62,000,000. It has been computed that £100,000,000 a year are annually expended in the United Kingdom in drink. If any appreciable proportion of this vast and deplorable outlay were devoted to industrial investment, the working classes might become more independent than they are of the aid of the capitalist.

There is, however, another, and a more practicable, form of coöperation, namely, that of payment by results. During the past winter, this subject has excited much interest, in consequence of the protracted strike of the workmen belonging to the Amalgamated Society of Engineers, who were in the employ of Messrs. Eaton & Anderson, at Erith. It had been specially urged by the officers of the society, first, that the practice of piece-work placed the men under the tyranny of what was called the "butty," or piece-master, system, and that the workman, under this system, did not get his share of the results, as it was monopolized by the piece-master. Secondly, that it frequently happened that workmen actually found, at the end of a job, on which they had been engaged, that they were in debt to their employers, inasmuch as they had not earned the full amount of their weekly rated wages, and were forced to pay the deficiency. Thirdly, that the results, even when equally distributed, were small in amount, and that actual earnings were reduced by the system, as wages were brought down by this process to the lowest possible point. These allegations have been carefully examined by Mr. Stark, Fellow of the Statistical Society of London, and the result of an inquiry shows that, of ninety-seven employers, from whom information was obtained, only fifteen pay through a piece-master; that a deficiency hardly ever happens; and that the additional earnings vary from fifteen per cent. to seventy-five per cent. on the weekly ratings. The lower earnings are exceptional, and are confined to small concerns. The weekly ratings are higher in districts where piece-work most obtains, than where it is never practiced; and the percentage additions on piece-work balances are highest in those shops, where the weekly ratings of the men are also on the highest scale. It would therefore appear that the best workmen are found, where piece-work is the established practice.

While piece-work is strongly resisted by the Association of the Amalgamated Engineers in its corporate capacity, and, by a certain proportion of the workmen, is much disliked, in many important

districts, the men, who have learned its value to the able and industrious mechanic, would strenuously oppose any proposal to limit its operations.

Piece-work has been strongly advocated by the most generous friends of the working classes. Among their number, I would specially refer to Mr. Mundella. In a speech made in London, on the 20th March, he delivered the following opinion on the subject: "He was an advocate of piece-work. Of the £240,000,000 a year of English exports, he believed he was right in saying that fully ninety per cent. were made by the piece. Of textile manufactures they exported, in 1874, £120,000,000 worth, and these had all been paid by the piece. So it was with iron and steel, to the extent of £31,000,000; and also with coal, cutlery, haberdashery, and other small articles, all of which, so far as practicable, were produced under the piece-work system. There was more piece-work, he maintained, done in England than in any other country in the world; and the more it was extended the better for the workmen, whether they liked it or not. Scamping was as often done under the day-work as under the piece-work system; for the master could push the men under both, and urge them to "slip" it. The question on that point was, what amount of money was the master prepared to pay, and what superintendence did he give as to quality? Piece-work tended to regularity of work, and the weak were better off by it; for, in slack times, these were, under a day-work system, the first to be dismissed. In conclusion, he made his earnest protest against any attempt to resist piece-work where it was honestly practicable."

Another eminent authority on the labor question, Mr. Frederic Hill, brother of Sir Rowland Hill, who holds a high permanent position in the post office, and is an entirely disinterested observer, remarks, in a recent address:—"The stimulus to ingenuity and exertion, given by piece-work, is, I have no doubt, one cause of the general superiority of English workmen over those of the Continent. It is well known that the rate of wages here is considerably higher than on the Continent; and yet English manufacturers are seldom induced to transfer their establishments to the Continent in the hope of getting their work done more cheaply; because, owing to the greater energy and activity of Englishmen, their higher wages are fully compensated for by greater production. In nothing, perhaps, has this English superiority been more manifest than in the railway work of navvies; in which, under the gang or butty system, the rule of payment according to the quantity of work done, instead of by time, is,

I believe, almost universal; and we have the satisfaction of knowing that the example thus set to continental workmen has produced the happy effect of raising their wages and permanently benefiting their condition.

Here I can not do better than give an extract from Mr. Brassey's essay on "Work and Wages," recording the experience of the author's father, whose testimony is emphatically in favor of piece-work.

"'My father,' says Mr. Brassey, 'always preferred putting a price upon the work, rather than paying by the day. This system was modified to suit the usual habits of the people with whom he had to deal. Piece-work could not in all cases be adopted without some complications and difficulties; but my father always looked upon day-work as a losing game, and all his work was carried out, as far as possible, by sub-contract, which is piece-work on a somewhat larger scale. Even the scaffolding for the erection of an iron bridge, such as that over the Severn, near Colebrook Dale, of two hundred feet span, was carried out upon the principle of sub-contract; and the same system was adopted for the excavation of shafts and adjacent lengths of tunnel. Payment by piece is beneficial alike to the master and the man. The man earns higher wages, while the master has the satisfaction of obtaining an equivalent for the wages he has paid, and completing the contract which he has undertaken with far greater rapidity. On public works, the difference in the earnings of the men paid by piece-work and men working by the day was always remarkable. In the canal-making days, men working in butty-gangs would earn four shillings; while others, working on the day system, would not earn more than from two to three shillings a day.'

"To me it seems that piece-work is one of the many instances in which a friend has been mistaken for an enemy; and that great calamity would befall those who have denounced it, if their denunciation were carried into practical effect."

The comparative efficiency of the English and the foreign workman has been much discussed in the present hard times, as it always is when trade is depressed. The truth is that there is little difference between the amount of work performed for a given sum of money in any of the manufacturing countries of Europe. The English workmen became idle when their wages were raised, and their hours of labor curtailed; but I have faith in their skill and physical power, and in their common sense. They are not likely to allow themselves to be

beaten in a fair and open competition. The best evidence of the excellence of the British workmen, is afforded by the high tariffs, which, in many countries, where the wages are lower, and the hours of labor longer than with us, it is thought necessary to impose in order to give effectual protection to native industry. If there were no protective duties, our iron-work would be found in use in France, in Russia, and in the United States, whence now it is only excluded by prohibitive imports.

The present depression of the iron-trade is not confined to England. The *Economist* gives a gloomy picture of the state of this trade on the Continent. In Germany there has been over-production. Wages have risen as rapidly as in England. Good workmen have become careless; and the general standard of diligence and workmanship has declined. In Belgium, more than half the blast furnaces are standing idle. Such a description as this is even more discouraging than that given of the trade in England. "Our faith," then, "is large in time." The growing mechanical genius of some countries may make them independent of England; but other markets will open out elsewhere. We know not what may be the future demand for our productions in Japan, in China, and in Africa.

It is idle to find fault with trades-unions. When men came to be employed together in numbers so vast, it was natural that they should combine to promote their mutual interests. It is better to recognize these organizations, and to make use of the facilities they afford for negotiation and agreement between employers and their work-people.

Even in the most prosperous times, there are multitudes who have to fight a hard battle in the daily struggle for life. Side by side with the colossal fortunes accumulated in successful enterprise, it is sad to see so many human beings without sufficient food or raiment. The affluent may strive to satisfy the conscientious scruples of their position by lavish doles to the poor. But this is not enough. Indiscriminate alms create more misery than they relieve, and their distribution requires an amount of careful inquiry that is not commonly bestowed. To the rich, it is easier to be lavish of their money than to devote their time to the practical work of charity. The poor, however, have a claim to both; and a full and generous recognition of that claim can alone dispel the bitterness and the envy, which an ostentatious display of wealth can not fail to excite.

In discussing the condition of the labor question in England, it has been impossible to suppress all allusions to the industrial compe-

tition between our country and the United States. We are now rivals only in the arts, the sciences, and commerce, which confer so many blessings on mankind. The people of England and the United States are bound together by many ties; by their common ancestry, by their language and literature, and by the laws and the liberties they enjoy. The natural attachment, which ought to unite them, was never more sincere; nor are there any clouds visible on the farthest horizon to overshadow the pleasant prospect of amity and peace, which the friendly relations of the great Anglo-Saxon nations so happily afford.

THOMAS BRASSEY.

THE SEA-SHELL AND THE SONNETEER.

Fair Ocean-shell! The poet's art is weak
To utter all thy rich variety;
How thou dost shame him, when he tries to speak,
And tell his ear the rapture of his eye!
I can not paint, as very truth requires,
The gold-green gleam, that o'er thy surface rolls,
Nor follow up with words thy flying fires,
Where'er the startled rose-light wakes and moves;
O! why perplex with all thy countless hues,
The single-hearted sonnet? Fare thee well!
I give thee up to some gay lyric muse,
As fitful as thyself, thy tale to tell;
The simple sonnet can not do thee right,
Nor fuse in one bright thought thy many modes of light.

CHARLES TENNYSON TURNER.

ESSAY THREE.

RETROSPECTIVE LEGISLATION AND GRANGERISM.

THE questions involved in the controversy which has arisen in certain States between the Grangers and railway corporations, are of such a character as to require mature consideration. On either side the dangers to be avoided are great. On the one side, a decision that a State has no power to touch the franchises of its railroads, not merely makes these railroads sovereigns, but establishes the doctrine that institutions based in any sense on contract, are out of the power of reformatory legislation, and that therefore, whatever monopoly the past may have erected, no matter how tyrannical, shall be out of the control of the future. On the other side, a decision that a State may so reduce tolls on a railroad as to destroy the security of the bondholders, not merely confiscates the property of these bondholders, but destroys the trust of men, both in each other and in the government itself. They will not trust each other when the law says that their contracts with each other need not be enforced. They will not trust the State which holds that it can morally pass a law destroying the validity of obligations. Here are two great dangers which meet us on either side as we endeavor to reach a right decision in the difficult question before us. Can such a decision be reached? Is any distinction possible which will enable us to meet the fair obligations imposed upon us by the past, and at the same time escape the burden of its monopolies and its barbarisms?

This question we purpose at present to discuss. We must, however, hazard two preliminary remarks. The first is, that the terms "laws," "legislation," and "statutes," which we shall hereafter use, and especially the term "statutes," which the Roman law adopts in this respect as a *nomen generalissimum*, are not to be treated as we would treat the Acts of Assembly of one of our particular States. A "statute," in the sense in which the term is used in philosophical jurisprudence, is a law imposed by the sovereign; and it makes no difference whether the sovereign acts through a parliament bound only by a flexible constitution of traditions, as is the case in England; or,

as in our own country, through a State legislature, a State constitutional convention, the Federal Congress, or a Federal constitutional convention, provided the body in question be competent to enact the particular statute. When we discuss the question, for instance, whether the State of Wisconsin is competent to adopt a statute reducing to a non-remunerative standard the railroad tolls of the State, the point is not met by saying that the *legislature* of Wisconsin has no such power. If Wisconsin, by a constitutional convention, has this power, then Wisconsin has the power to lower tolls by *statute*. So with regard to the Federal Government. If the Federal Government, by the agency of a federal convention, or by passing amendments subsequently adopted by the States, can make certain organic changes, these changes, in the sense in which we here use the term, are effected by *statute*.

We propose further, to draw, in the examination of this topic, on foreign jurists rather than on our own. Our own authorities, in fact, have been already fully and closely criticised in the discussion to which public attention has been turned. Nor is this all. Not only is the foreign field as yet untouched, so far as concerns American explorers, but it is peculiarly rich. The most distinguished and most able of European jurists have devoted themselves to the elucidation of the problem before us; and they have entered upon the task with the mission and the capacity of philosophers as well as of jurists. When I say that by American explorers the field is untouched, I should make one exception. Mr. Jefferson, when in France, studied with eager delight the essays on this topic of the French encyclopedists; and the conclusions of the French encyclopedists frequently exhibit themselves in the writings of Mr. Jefferson. But the pre-revolutionary French philosophers contributed but one of the several strata of which the foreign literature on this important subject is composed. These philosophers, contented with suggesting that, as generations are distinct, no one generation should be permitted to bind another, did not pause to weigh the countervailing difficulties of one of the most tremendous problems of their times. But what they had not patience to attempt, has since been successfully performed by German writers upon jurisprudence.[1]

[1] From Germany alone we have the following treatises: A. D. Weber, über die Ruckanwendung positiver Gesetze, 1811; Bergman, das Verbot der rückwirkenden Kraft neuer Gesetze im Privatrecht, 1818; Savigny, System Röm. Rechts, viii. § 383–400, 1849; Scheurl, Beitrage zu Bearbeitung des Röm Rechts, i. Nr. 6, 1853; Bornemann, Erörterungen, i. Nr. i, 1855; Schaaf, Abhandlungen, i. 2, 1860; Lassalle, das System der erworbenen Rechte, 1861; Schmid, die Herrschaft der Gesetze, 1863. In addition to this, we have from Wächter,

Of these writers I propose to draw especially upon three: Savigny, as representing the historical school, whose conclusions are based on a comprehensive induction; Schmid, as representing that school which seeks to construct, by criticism, a jurisprudence which is philosophically and logically consistent; and Lassalle, a political liberal of rare learning, eloquence and enthusiasm, whose office it is to maintain at once, that loyal protection of private obligations which is one of the first duties of the state, with that liberty to remodel obsolete institutions without which a sovereign must be comparatively helpless for good. I do not intend to give the distinctive theories of either of these great thinkers. My object is simply, after giving to them careful study, to present a summary in which the positions assumed by them are illustrated by the decisions of our own courts. The conclusions to which we thus arrive may remove many of the difficulties by which the Granger problem is beset. And the theory thus presented is this: *A statute which remodels public institutions may go into immediate effect, even though it recalls vested concessions made by the state to a particular social status; but no statute is to be construed as vacating obligations which the state makes directly to individuals, or which it authorizes one of its subjects to make to another.* In vindication of this destinction, I submit the following remarks.

The term "Conflict of Laws" has been treated in our Anglo-American practice, as limited to a conflict between the laws of separate sovereignties; and when we speak of laws contesting with each other for the control of a particular case, we usually mean the laws of separate territories contending as to which of them should possess such case as subject to its sovereignty. When, for instance, there is a question whether a debt is to bear the interest legal in Massachusetts, or the interest legal in Nevada, we are required to determine whether such debt has its seat in Massachusetts or in Nevada; and to decide this, we have to canvass the claim of these two conflicting sovereignties for the juridical direction of this particular debt. So, when the question arises whether a particular person is taxable in Massachusetts or Nevada, we inquire in which of these States such person is domiciled, and we therefore canvass the conflicting claims of these two States for the juridical direction of this particular person. Hence it is that the title "Conflict of Laws" is regarded by us as if it were convertible with that of "Private International Law."

But to the topic before us the title "Conflict of Laws" is equally

Unger, Vangerow, and Windscheid, discussions of the topic introduced into their authoritative expositions of the Pandects.

applicable. Laws may conflict not only because they emanate from rival sovereigns, each striving to possess the particular case, but because they emanate from distinct periods of time, each of which may claim to embrace the case in question within its sanctions. This may arise under the following circumstances:

a. A new general statute may be enacted, which may alter the law in reference to a particular line of cases, as where a statute is passed establishing a right which before did not exist.

b. A revised code may be adopted, partly digesting a mass of prior independent statutes, and partly codifying rules of law established by the courts.

c. A special statute may be passed to meet a particular case; as is done by special acts of legitimation, or by acts to settle doubtful questions of title.

d. A territory, which is subject to a particular jurisprudence of its own, is annexed by another, also with a particular jurisprudence. Here comes the question how far the jurisprudence of the annexing country takes the place of that of the country annexed. This has occurred, more or less completely, in our own annexations of Louisiana, of Florida, of Texas, of California, and of Alaska.[1]

These cases, distinct as they are in many respects, bring up the same common question: Can a statute have a retrospective force?

Before proceeding further, it is important to notice two cognate provisions in the constitution of the United States. The third clause of Sec., ix. provides that "no *ex post facto* law shall be passed by Congress." This has been construed to relate only to criminal jurisprudence; and to forbid any legislation which, as to a past act, either creates or aggravates criminality. By Sec. x., clause one, the same limitation has been placed on the authority of the States; and this limitation, it has been ruled by the Supreme Court of the United States, also concerns only criminal jurisprudence, and does not preclude the State from passing, in other matters, retrospective statutes, no matter how impolitic or unjust.[2] By a subsequent specification in the same clause the States are forbidden to pass any law "impairing the obligation of contracts." The construction of this limitation is a topic too special and important to be undertaken in the present article. Assuming that the States are here prohibited from passing statutes which affect retrospectively contracts already existing

[1] As to Texas, see League v. De Young, 11 Howard 185.

[2] Watson *v.* Mercer, 8 Pet. 110; Satterlee *v.* Matthewson, 2 Pet. 412; Susque. R. R. *v.* Nesbit, 10 How. 401.

and valid, we dismiss this branch of the subject from our consideration; and content ourselves with inquiring in what respects, aside from the provisions of the federal constitution just given, retrospective legislation can be effective.

RIGHTS ROOTED IN THE SOCIAL ECONOMY OF THE STATE MAY BE MOLDED BY RETROSPECTIVE LEGISLATION.

When we analyze the rights of persons, so far as concerns the topic before us, we find that they comprise, on the one side, such generic rights as touch men in their social, political, and economical relations, and on the other side such special rights as vest the title to property in individuals. The first of these, may, as a rule, be affected by retrospective legislation; the second cannot. As instances of retrospective legislation of the former class, may be mentioned the following:

1. *Commutation of Perpetuities.*—We can conceive of a perpetuity so established that in the course of time it will absorb the entire wealth of the state. We know that entails of land have been so constructed that if they had been held sacred, they would have confined the ownership of the soil to a limited aristocracy. The English judges, however, by what Mr. Bentham calls judge-made law, broke up the perpetuity of English entails by the fiction of common recoveries; and what in this case parliament permitted the courts to do indirectly, it had the indubitable power to do directly by statute. Supposing a trust of personalty, for instance, so established as gradually to draw into its vortex the wealth of the country, I cannot doubt that the state (either by constitutional amendment or by legislative act) could intervene, and determine that the trust should cease. Of course this should only be done with proper compensation to the parties interested. But whether with or without their consent, it ought to be done; and when done, the statute will be construed to operate on interests previously legally established. On analogous reasoning a statute authorizing a sale, by a court of equity, of real estate, which is held in joint tenancy or coparcenary, whenever partition can be made in no other way, has been ruled in Connecticut to be within the legislative power, as "purely a remedial law acting upon existing rights, and providing a remedy for existing evils."[1] So in New York a statute passed in 1779, transferring the seigniory and estate from the Crown of Great Britain to the people of New York; and the statute of Tenures, passed in 1787, abolishing military

[1] Richardson *v.* Muvyson, 23 Conn. 94.

tenures, and converting all manorial and other tenures into fee and common socage, took effect retrospectively, and operated on all lands and tenures held under Colonial grants.[1] These conclusions are in full accordance with the rules laid down by Savigny, Weber, and Schmid.

2. *Repose to Titles.*—Public policy requires that after the lapse of a given period, the right to institute litigation shall be denied; so that time, while on the one hand destroying the muniments of title by the effect that decay produces on evidence, shall on the other hand drop over the evidence thus defaced a shield by which hostile investigation can be repelled. Acting on this principle, there is no civilized code that does not incorporate statutes of limitation providing that, after a specific period titles shall not be disputed; and these statutes have been held by the courts to affect vested rights. Even a statute making uncontested probates final after five years, is applicable to probates granted before the passage of the act.[2]

3. *Modification of Police Rights.*—So when a statute, which, on police or sanitary grounds, gives certain rights of action or defense, is repealed, the rights so given fall with it.[3] This has been applied to statutes on stock-jobbing and to usury statutes.[4] The statutes last mentioned may be treated as relating to the moral health of the community, and as therefore liable to be modified on public considerations. The same may be said as to statutes relating to the physical health of the community. An ordinance establishing certain sanitary precautions may be repealed, and these precautions swept away, no matter how deleterious this may be to a particular neighborhood. And so a fever hospital may be established on a special site, though the effect may be disastrous to the population of the vicinage.

4. *Seizure of Property for Public Purposes.*—So as to property taken to carry out a great public improvement. A railroad has to be built, and the State determines to take the land of private owners for this purpose. This, under our constitution, cannot be done without compensation, but it can be done without consent. We may say we will not sell our land to the State, especially at the State's price; but this we may be compelled by the statute to do. Here, again, a statute based upon public polity is construed to affect rights previously established. The same reasoning sustains the retroactive effect of statutes

[1] De Peyster *v.* Michael, 2 Seld. 467.

[2] Washburn *v.* Franklin, 36 Barb. 599.

[3] Kenyon *v.* Stewart, 44 Penns. St. 179.

[4] Baargher *v.* Nelson, 9 Gill, 299 (indexed as Grinder *v.* Nelson); Custis *v.* Leavitt, 17 Barb. 311.

authorizing the explosion of buildings by which, in case of a conflagration in a great city, a fire may be stopped. I may have bought my house prior to the passage of the statute. The statute, nevertheless, applies to my house, and the municipal authorities may destroy it, if necessary to stop the flames by which the city may be consumed.

5. *Modification of Marital Rights.*—So, also, as to statutes relating to divorce, and to the status of husband and wife. A. and B. were married ten years ago; and this year a statute is passed authorizing divorces for desertion. Of this statute A. may avail himself, though his marriage took place prior to its passage, and though B., under the law in force at the time of marriage, could only be divorced for adultery. So as to the status of husband and wife in respect to property. At the time of marriage A. has the right, which the English common law gives, of control of his wife's personal estate. Subsequently, a married woman's act is passed, securing to all married women the independent control of their estates. By this statute A.'s control of his wife's property is divested, though this control had been previously established by law.[1]

MORAL LIMITATIONS ON THE EXERCISE OF THIS POWER.

Is it true, as Savigny reminds us, that the power here conceded should be exercised with great reserve. When public endowments are withdrawn, (as, for instance, in cases of ecclesiastical dis-establishment) the statute is to be so construed as to reserve the life interest of the incumbent; and when rights of property are destroyed, this must be done so as to make such destruction take place only on the death of the present possessor. The leading maxim, to which we will again recur, is that estates to vest in future, are expectancies which the law can mold or divest, but that estates now vested, it cannot touch. Yet, so far as concerns the public bearing of the question, the liberty on the part of the State to reorganize its institutions, even though in such reorganization vested rights are destroyed, cannot be denied. No doubt the public rights of the church were ruthlessly and recklessly overridden at the time of Henry VIII.'s spoliation of the abbey endowments, but England would have perished had the best part of her soil been held in mortmain, and it was better that the abbeys should be destroyed than that England should perish.

[1] See Noel *v.* Ewing, 9 Ind. 37; Davis *v.* O'Ferrall, 4 Greene, (Ia.) 168; Sturtevant *v.* Norris, 30 Iowa, 65. It is otherwise, however, as to the wife's dower

CONCERNING OBLIGATIONS WHICH THE STATE MAKES DIRECTLY WITH INDIVIDUALS, OR WHICH IT AUTHORIZES ONE OF ITS CITIZENS TO MAKE WITH ANOTHER.

We proceed to notice the second of the two propositions which disposes of the topic of the conflict of laws viewed in reference to time, viz.: *Statutes are not to be construed so as to vacate obligations made under prior statutes.* Before giving illustrations of this rule, it is proper to notice one or two qualifications with which it is to be received.

Expectations are not rights. A son may expect to inherit all his father's estate. The legislature, before the father's death, but while the son is living in this state of expectancy, passes a statute authorizing adoption. The father adopts a second son under the statute; and this son takes his share of the father's estate, notwithstanding this defeats the expectation of the prior son born in wedlock. Hence we may also say that unvested rights dependent upon a statute, fall when the statute is repealed.[1]

Political or social immunities are not rights. General political or social rights belonging to a community are not so vested that they may not be immediately limited by law. Thus all men may be said to have a natural right to buy and sell what they please; yet no one questions that a limitation of the right to sell powder or poison can be made to operate upon living persons; nor can it be doubted that tariff laws can be properly construed so as to operate upon goods already imported, or in the course of importation.

These exceptions being removed, the following may be given as illustrations of statutes which are not to be constructed as affecting rights acquired under prior statutes.

Statutes changing modes of acquiring property cannot be construed retrospectively. As to such statutes, we may accept as indisputable the position of Savigny, that a statute prescribing as essential a particular mode of acquiring property, does not affect a title acquired in conformity with an older law. A statute, for instance, may make delivery essential to a sale of goods; but a *bona fide* sale, prior to the statute, and valid by the then law, is not invalidated by the statute, though made without delivery. So, also, as to registration laws, and the statute of frauds. So as to titles under the statute of limitations, or *usucapion*, as it is called in the Roman law.[2] A title which has

[1] Tivey *v.* People, 8 Mich. 128.

[2] See fully, on this topic, Savigny, viii. § 391.

been divested under an old statute, is not vested by a new statute prescribing a shorter period. So is it also as to the capacity of parties. A person who is *capax negotii* makes a sale. Subsequently, his capacity is suspended by statute. This, however, does not disturb the sale.

In one point, only, is there doubt as to the application of this rule; and this is where a statute enacts that a legal act may take place with less onerous solemnities than those previously in use. It has been argued that, as all statutes imposing forms are in restraint of liberty, a statute repealing such restraints only restores business to its natural condition of freedom, and that therefore such statutes should have retroactive force. But although this view may operate when the government, as in case of the repeal of statutes requiring stamps, simply remits a debt due to itself, we cannot go further, so as to alter, by a retroactive law, the relations of the parties. A will invalid at the testator's death, for want of due formalities, cannot be validated by a subsequent statute dispensing with such formalities. Titles which have matured in consequence of the non-recording of a prior deed, cannot be unseated by a statute repealing those requiring deeds to be recorded. The State may respect its own fiscal regulations so far as concerns itself: it cannot destroy the rights of *bona fide* holders under its own laws. So no statute can attach (except by general taxation) new burdens to relations previously established by law. Thus the legislature cannot make corporators retrospectively liable for corporate debts.[1]

Valid sales and assignments cannot be invalidated by subsequent legislation.—A sale valid under the law at the time existing, is not invalidated by the passage of a new statute requiring all sales to be perfected in a mode not adopted by the sale in question.[2] And the converse is true, that a statute is inoperative which undertakes to validate past conveyances of real estate, which were invalid from want of proper solemnization.[3]

Bad liens cannot be made good by subsequent legislation.—So with regard to liens. A lien bad at the time of its creation, cannot be validated by a subsequent statute:[4] a lien good at the time of its creation, cannot be invalidated by a subsequent statute.[5] So a lien

[1] Coffin *v.* Rich, 45 Me. 507. [2] Savigny, viii. § 390.

[3] Good *v.* Zercher, 12 Ohio, 394; Russell *v.* Rumsey, 35 Ill. 362.

[4] Savigny, viii. § 390; L.

[5] See Neff's Appeal, 21 Penns. St. 243; Streubel *v.* Milwaukee R. R. 12, Wisc. 67; Gazelle *v* Lake, 1 Oregon, 119.

not yet perfected, falls with the repeal of the law authorizing such lien.[1]

Statutes cannot retrospectively affect status of parties so far as concerns liability to debt.—Nor can a statute impose on a party a debt arising from a past transaction which subjected him to no indebtedness. Thus in Massachusetts a statute declaring that a suit could be maintained by towns against paupers for expenses incurred in the removal of the latter, has been held inoperative as to past transactions, on the ground that the legislature cannot by legislative act create an indebtedness that did not previously exist.[2]

Obligations legally executed cannot be vacated by a statute incapacitating the obligors.—Supposing a person incapable, in consequence of minority, of executing a legal instrument, is made capable by a subsequent general statute (*e. g.*, shortening the term of minority), is such statute retrospective? The answer is this: that when a statute prolongs or shortens the term of minority, it does not touch acts performed under the prior law. If such acts were legal under the prior law, they continue legal under the new statute: if they were illegal under the prior law, they continue illegal under the new statute.[3]

So as to sex. A married woman under the English common law makes an assignment of which she is incapable. This assignment is not validated by the passage, a year afterward, of a married woman's act, bestowing on her capacity to make such assignments. Nor, if she should make an assignment good under the latter statute, would the assignment be invalidated by the subsequent repeal of such statute.[4]

Wills cannot be retroactively affected.—The disposition of an estate by will rests on the assumption that the will is the final expression of the testator's wishes; *suprema, ultima, voluntas.* As, however, it is impossible to make a will in the very moment of death, wills are made provisionally, subject to be altered or destroyed during the testator's life, but called into legal existence at the moment of his death. Two distinct periods of time, therefore, are to be taken into view in connection with the validity of wills. The first is the period when

[1] Bailey *v.* Mason, 4, Minn. 546; Dunwell *v.* Bidwell, 8 Minn. 34. The Mississippi statute limiting the effect of foreign judgments to three years from rendition, will not be construed retrospectively. Boyd *v.* Barringer, 23 Missis. 270, Garrett *v.* Beaumont, 24 Missis. 377; Munroy *v.* Gibson, 15 How. U. S. 421.

[2] Schmid, ut supra; Windscheid's Pandekt § 32; Medford *v.* Learned, 16 Mass. 216. See, however, Guilford *v.* Chenango Co. 3 Kernan, 147.

[3] Savigny, viii. § 389.

[4] Chabot, Questions transitoires sur le Code Napoleon, t. i. p. 29.

the will is executed. The second is the period of the testator's death. The first is designated by Savigny as the period of the practical execution: the second is that of the juridical execution. Hence he argues that as to the *form* of a will, the law in force at the time of its execution must prevail: as to its *substance*, the law in force at the time of the testator's death.[1]

Contracts are to be governed by the law in force at their execution. —The question of retrospective legislation, so far as concerns contracts, is largely affected by the clause in the constitution of the United States, forbidding the violation of contracts. It may nevertheless be not unimportant to remember, that on general juridical principles, no statutes which destroy the obligations of contracts, or of particular classes of contracts, can be held by the courts to act retrospectively. For it is a fundamental principle of jurisprudence that a contract is to be construed according to the law which was in force at the time of its execution. This rule, says Savigny,[2] is applicable, not merely to the form of the contract, and to the question of the capacity of the parties, but to the conditions which effect its validity, and which respect the manner and degree of its efficacy. The right to insist on the perfection of these rules, no matter what may be the course of subsequent legislation, is vested in both parties at the time of the execution of the contract. Nor, as has been seen, can the capacity of parties to contract, be affected by subsequent retrospective legislation. If there is liberty to contract, and a contract is made in accordance with such liberty, a subsequent act, restricting the liberty, does not affect contracts previously made. A person of full age under existing law, may bind himself by contracts which no subsequent statutes reducing him to minority can affect. So, as has been seen, is it with regard to acts by married women. A married woman binds her estate by a contract she is legally entitled to execute. A subsequent statute takes from her this capacity. This statute in no way touches her prior contracts. The principle is this: When a legislature authorizes a contract to be made, and the contract is subsequently made in accordance with the legislative power, no subsequent legislation can affect the validity of such contract.[3]

[1] Savigny, viii. § 393. But with us a legislature cannot by subsequent act validate a will which was invalid at the time of the testator's death, for want of due solemnization; Greenough *v.* Greenough, 11 Penn. 489.

[2] Röm. Recht. viii. § 392.

[3] Rice *v.* R. R., 1 Black, U. S. § 358. See Graham, *ex parte*, 13 Rich, L. 271; Streubel *v.* R. R. 12 Wisc. 67; Steamship Co. *v.* Joliffe, 2 Wall, 450.

APPLICATION OF PRINCIPLES JUST STATED TO GRANGER LEGISLATION.

A contract, according to the principles which have just been given, absorbs into itself the law under which it is made. That law becomes part of the contract, as much so as if the contract created the law. One party asserts that the law enables him to make the contract, and the other party agrees to the statement; and if the assertion and acquiescence are made intelligently, such law, so far as these parties are concerned, remains unalterable. The law may be changed in other relations, but in this relation the parties are bound to act as if the law continued to be as they agreed with each other it was to be interpreted.

Hence, when a legislature authorizes a railroad corporation to borrow money, and to hypothecate its franchises for this purpose, this is an offer by the State, through its agents the corporation, to borrow money, the franchise and the property of the road being security. The State says, "Lend this money, and you shall have this security; and as part of the security is the power vested in the corporation to levy tolls to pay your debt." The law to which the contract of loan, as executed upon this statement, is subject, embraces this right on the part of the corporation to levy tolls. The contract virtually asserts this right: this right is one of the considerations of the contract; and this right is guaranteed by the State, when it charters the road, with the right to hypothecate its franchise (which includes the power to levy tolls) for the payment of the loan. The case is far stronger than the cases cited above from the Roman law. In those cases it was held that the law applicable to a contract at the time it was executed continues always to be the law by which a contract is to be governed, because such law is a part of the contract, and the parties agree with each other to accept the law as part of the contract. But bonds issued by railroad companies have an additional sanction. Not merely is the then existing law accepted as part of the contract by the corporation and the bond-holder, but it is ratified as such on the part of the State. As long as those bonds are outstanding, they bind alike the State, the corporation, and the bond-holder, to the principle that it is both the duty and the prerogative of the corporation to levy tolls to pay its indebtedness.

It may be said that this militates against the doctrine heretofore announced, that it is within the power of the State, by constitutional convention, if not by legislation, to change those of its institutions

which are rooted in the social or economical system of the State. Is not a railroad corporation, it may be asked, of such a character? May it not become as dangerous as perpetuities, which it is admitted may be liquidated by the State? No doubt it may become equally dangerous; and no doubt (apart from the delicate questions raised by the provision in this respect by the federal constitution), the State, when public polity renders it imperative, may recall the charter of such an institution. But if it does so, this can only be by paying the debts that it authorized the corporation to contract. The State says to the railroad company and to third parties: "I authorize you to borrow money on the faith of securities I lend you for the purpose." The State cannot withdraw the securities (*i. e.*, the franchises, including the right to levy tolls) without providing for the debts. No statute which does not provide for such debts will be construed as requiring the corporation to so diminish its tolls as to impair its own means of payment.

It is said that the State reserves, in the charters under discussion, the right to amend or repeal; and that this authorizes it to withdraw from the corporations the franchises which it granted to them, and on the faith of which it authorized them to issue bonds. But the right to amend or repeal does not vary the case. Statutes conferring on married women business capacity may be repealed, and the business capacity of such women taken away from them by subsequent legislation, but this does not affect retrospectively the contracts entered into by these women before the repealing acts. The charters of the railroad companies before us may be repealed, but the repeal does not affect the validity of their acts while their corporate existence continued. And the franchises the State granted to them for the purpose of making such contracts, must remain theirs as long as the contracts are outstanding. For public purposes, no doubt, the State can close the road, and extinguish the charter, but it can only do so by giving compensation to the parties whose rights it thus sacrifices to the supposed public good. In other words: Either a railroad is a private enterprise, like any ordinary undertaking for common carriage, or it is a public enterprise, acting for public purposes under the auspices of the State. If a private enterprise, then its right to fix its own prices for its work is as much outside of legislative control as is the right of the mechanic to ask what he can get for his labor or the shopkeeper to ask what he can get for his goods. But if a railroad is a public enterprise, using with permission the franchises of the State, then the State, which authorizes it to

borrow money, and lends its franchises to the company as security for the debt, subjects these franchises to the payment of the debt; and the franchises thus pledged cannot be recalled or restricted until the debt is paid.[1]

The view here defended has two advantages: It recognizes the right of the State to remodel its institutions from time to time, as the welfare of the commonwealth requires; and it preserves the rights of individuals who, on the pledge of the State's franchises, lend their money on public improvements. FRANCIS WHARTON.

[1] It is remarkable that among German jurists the most liberal are those who hold that no statutes (no matter how strongly expressed) are to be construed as having a retrospective effect. See, to this purport, Böcking I. p. 317, and Lassalle, p. 55. Their argument is that free institutions will have no chance if enfranchisements worked by them can be retroactively recalled, and no free governments can stand if their enactments are not sustained in good faith.

ESSAY FOUR.

THE GRANGE AND THE POTTER LAW.[1]

AN article in the January–February Number of the current volume of the INTERNATIONAL REVIEW, entitled "Retrospective Legislation and Grangerism," while written with seeming candor and judicial fairness, presents but one side of an important question, and that in such a manner as to do serious injustice to those who stand as the representatives of the other side.

As briefly as possible we will state the positions taken in that article, treating them in order.

1. *Grangerism is reducing tolls on railways, by legislation, to a non-remunerative standard.*

In truth, the Grange has no political status—it has never nominated or elected any man to any office, nor organized or maintained a lobby to influence legislation; neither has it any political platform.[2]

[1] By the term "Potter Law" we mean all the railroad legislation enacted in the year 1874, in Wisconsin.

[2] The President submitted to the Wisconsin Senate the following communication of Honorable M. K. Young, member of executive committee of the State Grange of Patrons of Husbandry, relative to taxation and tariffs of railroads, and accompanying resolutions:

To Lt. Gov. Parker, President of the Senate:

In presenting through you to the Senate the accompanying resolutions of the state grange upon the subject of railroad legislation, it is proper that a word be added to lessen the chances of their being misunderstood. The entire scope of petition set forth in the resolutions must be taken together, and some of the language used, instead of being employed as direct, was evidently used as relative terms of expression. Hence I am of opinion that our people (the state grange) attached but little importance to any one basis of taxation other than is conducive to the equities of detail. I am of the opinion that our people, while unable to see uniformity of taxation when based on the gross earnings of railroads, and not on the gross earnings of the farm and workshop, are content if the revenue exactions necessary to the protection of the rights of all be fairly adjusted. It is apparent, too, that "the taxation of railroad property as other property," was intended to apply to the burdens, as much or more, than to the forms of taxation. It is proper to say that our people ask squarely for an increase of tax on railroads. Nor is there any mistaking their wish for a maximum tariff for freight and passengers, and a commission to regulate unjust discrimination, and to collect and report facts for the intelligent guidance of future legislation. The former of these, they evidently regard as the restraining measure suggested by the experiences of the past, the latter, as mainly obviating the existing legislative necessity of

It has been diligently courted by both parties with a view to marriage, but it still remains single.

The Potter Law was in no sense the creature of the Grange[1] neither did it reduce rates below a non-remunerative standard. It did not destroy railroad values nor did it reduce them to any material extent nor check railway construction.[2] The actual gross reduction under that law was not over five per cent.

The true scope and intent of that law was, the equalization of rates, and the forbidding of discriminations between articles and persons. It also prohibited the giving of free passes, and the receiving of them by all state officers, judges of courts of record, members of

being generous by supplying such as will promote the more equitable consideration of being entirely just.

All these points of expression, and petition from our people, proceed from the conclusion that the representatives of the people of the state have legitimate control of the entire subject. This conclusion is founded upon the idea of the absolute sovereignty of government. If, in the grant of exclusive corporate privileges, government be held as parting with ultimate control of the grant, it carries along with it the idea of impaired sovereignty. If the absolute sovereignty of government can be impaired in one direction, it can be in another, and the question arises, how far can the absolute sovereignty of government be impaired without abolishing all the functions of government? The deep solicitude of our people, in this subject, arising both from principle and interest, may throw a ray of light upon the manner of their appeal to the legislature. While abstaining from politics as an order, they feel at liberty to scrutinize public measures, and make themselves felt in all such as embrace the general welfare.

All of which is respectfully submitted,

M. K. YOUNG.

[1] The complexion of the vote by which the Potter Law was passed in the Senate shows only eight votes by farmers, and eighteen by those in other occupations: Lawyers 4, Physician 1, Manufacturers 4, Editor and Printer 1, Bankers 3, Agents 2, Lumbermen 4; Total vote 26 yeas, 5 nays.

[2]

Total mileage in operation in Wis	2,565.73			
" length of sidings (estimated)	200.00			
Increase of mileage in Wis. (1874)	87 m.,	in (1875)	20 m.	
Average increase in states	"	85 m.,	in "	65 m.
Total increase in U. S.	"	1940 m.,	in "	1500 m.

During the year 1874, there were in the United States, at one time 122 roads in default for non-payment of interest . . . in that list of 122 there were two Wisconsin roads, and they were unaffected by the Potter Law, except the limitation to 4c. mile rates for passengers, that being the highest rate fixed.

The average rate of interest payable on the bonded indebtedness of roads in Wisconsin is 7.5c.

Total amount of interest paid by roads in this state for the year ending June 30, 1875, is $4,565,249.34.

The number of passengers has steadily increased from year to year—

Whole number carried in	1873.....	3,963,039
" " "	1874.....	4,457,078
" " "	1875.....	4,628,507

the legislature, or members elect, or passes at a discount, under penalty of fine or imprisonment, or both.

The actual test of the law increased the net earnings, by reducing expenditures and increasing business, and proved wholly beneficial. And yet the law would have failed of enforcement, but for a firm and energetic executive, undeterred by the menaces of the roads and the opinions of hired attorneys.

If there was anything savoring of grangerism in that law, it was the stringent prohibition of discrimination in rates between individuals, and of free passes. The granger was willing to pay a fair rate for himself, but was unwilling to pay for others as able as himself to bear their own expenses.[1]

2. *A legislature has no legal or moral power or right to reduce rates or to fix them, after conferring that power on a Railway Company.*

The legal power may be held in abeyance in some states by virtue of the decision of the Supreme Court of the United States in the celebrated Dartmouth College case, but it can not be said of Wisconsin, for by a constitutional provision,[2] it has reserved the power to "alter or repeal" all the franchises it may have conferred on any corporate body.

The legal power of the legislature in Wisconsin, to regulate tolls is unimpaired—but what of the moral right? Did the state, in conferring its franchises on railway companies, become in any sense involved as a party in any contract which impaired her power to alter or repeal those franchises? Not in the least. The reserved power to alter or repeal is a condition precedent to all grants, and becomes incorporated into all transactions predicated on such franchises. It also acts as an estoppel to any and all claims for indemnity for any depreciation which may attach to any corporate property, by any act of the legislature.

In grants made by the state, nothing passes by implication. But it is conceded that the state has both the moral and legal power to confer the right to levy tolls to the railroad company, and when, as in the State of Wisconsin, the right is given subject to the constitutional provision of repeal or change, it seems to us, there is no room for questioning the propriety of the exercise of the power, when in

[1] While the State Grange was in session in the capital at Madison, during the winter of 1874–1875, an offer was made by two of the principal railroads to return them at 1c. per mile rates, but the offer was respectfully declined. The Grange has never asked for reduced rates to any of its gatherings.

[2] Sec. I. Art. 11.

the judgment of the state it is demanded in the interest of the public. All contracts absorb into themselves the law under which they are made; the "reserved power" is a part of the contract.

3. *When a state confers franchises on a railway, it may not restrict or recall them, except it first provide for the payment of all its indebtedness.*

This statement involves the absurd proposition that a part is equal to the whole—that the franchise to levy tolls is all there is of value in a railway:—that the roadway, ties, rails, fences, depots, rolling stock and all other equipments, and the business pertaining to the route, are all worthless, representing no power to satisfy any claims against the company, and it must also be borne in mind that nearly every road in Wisconsin owns large quantities of donated lands. So also the company may vacate their franchises and operate as a private company, or sell to other parties who may be willing to operate the road under legislative control or supervision.

But if this claim is admitted, then it concedes too much, for if the state by any other act reduced the earnings of the road below a remunerative standard, such as taxation, safety to passengers, liability for damages to person or property, or by some financial regulation which should reduce the ability of the public to use the road, it would just as properly be made liable to pay all the indebtedness of the road.

What of the case where the state charters a parallel line, more favorably situated than the first, and more liberally endowed with benefactions, so that it can carry at less rates, and thereby ruins the first company by reducing rates below a remunerative standard!

The effect is the same whether a blow be struck by a fool or a madman, and we see no moral distinction between an indirect or direct way of reducing the power of a company to meet the just expectations of its creditors.

If a railway company contract such a bonded indebtedness that its earnings will pay only interest on it, then the state would be forever estopped from putting any check on the avarice or extortion of the company, and the public could have no relief by any act of the legislature or courts, for the company could insure immunity forever, by making a debt greater than the road would sell for, and thus make it a losing investment for the state to pay so much for so little.

This claim, if admitted, is a virtual premium on "watering stock" and prodigal borrowing, for all the justification needed for exacting high rates is, that it is necessary to pay the stockholders ten per cent,

that being the legal interest in Wisconsin, and they may pay such wages and salaries to their officers as they deem best—and it ends in this—that the company has only to keep in debt to keep all restrictive legislation at bay, and there can be no relief to the state except by paying them for their viciousness.

The reserved power would be nugatory, if the mere use of the franchise could operate to put it beyond alteration or repeal. The position is a mere *petitio principii.*

On the other hand if the company keep rates so low that they pay no interest or dividends we see no valid reason why its creditors may not demand of the state either that it legislate to secure increased rates, or pay itself what the company fails to pay.

Finally—we see no escape from the conclusion that, granting this claim to be well put, no remedial legislation could be reached, and no wrongs however flagrant could be redressed; for even a fine imposed on the company or one of its agents for violation of law, would impair the ability of the company to pay, and consequently to be forborne.[1]

4. *The state, in authorizing railway corporations to borrow money, does itself contract with the individuals who lend money to the company, and any restriction on its power to levy tolls is both a violation of contract and confiscation.*

It seems very curious that the sovereignty in matter of tolls passes entirely to the railway, and the responsibility for payment of

[1] In Tomlinson *vs.* Jessup, 15 Wal. p. 459: "The reservation affects the entire relation between the State and the corporation, and places under legislative control, all rights, privileges, and immunities derived by its charter directly from the State."

See also Miller *vs.* State, 15 Wal. p. 478: Olcott *vs.* The Supervisors, 16 Wal. p. 673., the Court says, "The railroad can therefore be controlled and regulated by the State. *Its use can be defined; its tolls and rates for transportation can be limited.*"

We quote from the opinion of Attorney-general Sloan: "The legislative act is conclusive that the rate is reasonable. The exercise of the power is of itself an assertion of its justice and of its necessity. The railroads can not question it; the courts may not review it, forby the agreement of the parties in accepting the charters under the reservation, the whole subject is withdrawn from the domain of judicial decision and remains only a matter for the legislative conscience." . . "It is difficult to see how restricting these tolls within certain limits which the legislature deems just, is any more depriving the corporations of their property than it would be to repeal their charters and thus deprive them of the power of charging any rates at all, and this latter power may confessedly be exercised *without making compensation.*" . . "We do not claim that this reserved power gives to the legislature any right over the property of the corporation. It can deal only with franchises. Over them it has absolute control."

In Thorpe *vs.* R. and B. R. R. Co., 27 Vt. p. 146, the court say, "The privilege of running the road and taking tolls or fare and freight is the essential franchise conferred."

its indebtedness all passes to the state. In truth this fiction of legal responsibility attaching to the state, in authorizing a corporate body to borrow money, so that the state is virtually the sole contractor, is a sheer assumption on which to rest that wrested and distorted construction, so much in favor with monopolies, of the term "Vested Rights" or its equivalent "violation of contracts."[1]

The state may no more commit suicide than a person, and yet if the above principle be correct it involves nothing less. The assumption that the state may do indirectly what it may not do directly, *i. e.* vacate its sovereignty by passing it to the possession of the railway company, is simple suicide. It is just as tenable to assert that when taxes have been remitted as a bonus to a railway on its lands or other property, that it would be a violation of contract, and confiscation, to relay taxes, since it would impair the revenues of the railway and reduce its ability to pay its bondholders.

It is simply monstrous to claim that the state is only an Indemnity Bureau in the use of its sovereignty as guardian of the public against corporate mismanagement, avarice, or fraud.

It does not seem credible that the charge of confiscation is soberly urged against the state in this issue. It would rest on far more tenable ground if urged against the United States, in its taxing the circulation of the state banks ten per cent., which compelled them to withdraw and cancel their bills and surrender their charters, and yet it was a legitimate exercise of its sovereignty over a matter entirely at its discretion.

5. *A railway company is either a public or a private enterprise.*

Chap. 341—Laws of 1874, Sec. 1—declares all railways to be "public highways," and railroad or other transportation companies to be "common carriers," and forbids "unjust discriminations" in persons or property.

We hold with Chief-justice Ryan that all corporate bodies are both *quasi* public and *quasi* private; the material property which the railway company may become possessed of is as exclusively their own as though held by private persons, while their franchises are held in trust for public use, and are always at the sole disposal of the power that conferred them.

If the contingency predicated by the article under review should

[1] We see no justice or equity in the state being made responsible for the indebtedness of railroads, and leaving the creditors of all other corporate bodies without such indorsement or guaranty against loss. Are the creditors of railways to be secured against the ordinary risks of investment, and no others?

arise, of the state fixing rates below a remunerative standard as judged solely by the railroad company, thereby necessitating by the state the assuming of, or providing for, the payment of all outstanding obligations of the company, some very important questions would suggest themselves which are not reached by any principles there advanced, and we propound them for the mature consideration of those who teach the doctrine of necessary compensation.

a. If the state receives nothing for conferring franchises on the railway company, why should it buy them back at such price as the sole will of the company may fix? in other words, by paying its whole indebtedness?

b. Who will own the road after the indebtedness is paid, the state or the company? or will they become joint owners?

c. In case the state pays the indebtedness, should it not be entitled to a drawback or rebate to the full amount of all aid which it has granted in virtue of its authority, such as bonds, land grants, and moneys voted by towns, as well as all taxes remitted by exemption?

d. If the state pays the indebtedness of the roads and leaves the company in ownership, will it have acquired more or less right or power to protect the public from extortion or discrimination, and if either, how?

Forty years of railroad experience practically determines that no causes are sufficient to effect the needed control of transportation by rail except restrictive legislation. The competition effected through parallel lines and water routes are insufficient and only partially available, and the owning of a portion of the railways by the government, is not admissible in this country, though it may be in Europe.

The Massachusetts Commissioners assert that the natural law of political evolution governing transportation by rail may now be formulated. The different phases of experience through which this ultimatum is reached are presented as being:

1. Non-interference of government. 2. Legislative regulation. 3. Executive supervision. 4. State ownership.

Of course we can not agree with the fourth term, and would combine the second and third; but we would approve of the fourth rather than the *imperium in imperio* which the railway companies issued after the passage of the "Potter Law," and indeed virtually exercised before its enactment.

The causes provocative of the restrictive legislation of 1874 in Wisconsin, may be summarized under the following heads:

Private gains at the expense of stock and bond holders; water-

ing of stock; corrupt letting of contracts; fraudulent purchase of other roads; misappropriation of land grants; disregard of public convenience; excessive charges. These and other kindred practices made the nominal cost of roads from twenty-five to fifty per cent. above what careful, honest management necessitated; and on this inflated, fictitious basis, charges were fixed amounting at times to almost a prohibitory tariff on production in reaching a market.

We know that a statement is going the rounds of the press, that the grangers wanted their produce carried to market at the expense of others, but we question the decency of such a charge, made by men who ride on these roads with free passes and who never paid a tax to help build them. The animus of the charge and the source from which it emanates does not entitle it to serious consideration.

The statutes of Wisconsin exhibit a multitude of grants, concessions and powers conferred on railways and other corporate bodies: such lavish endowments as sober, unbiased judgment could scarce make accord with even the best good of the grantees, much more that of the grantor; and when a very slight check is put on the "full swing" which was previously accorded, they boldly and audaciously put forth their dicta, "That no statute which does not provide for their debts will be construed as requiring the corporation to so diminish its tolls as to impair its own means of payment."

It certainly were far better that the state should never charter a railway company, than that she should be mulcted in costs to the extent of whatever the criminal or offending company may choose to impose as penalty for any interference in fixing rates of toll.

We offer a conundrum to the legal lore that devised such a fine device for the exemption of railways from all liability to pay their just debts: why should the citizen be taxed to build the railway, taxed to use it, taxed extra that the road may be partially or wholly exempt, and yet the claim be urged that it is private property?

But cutting through to the core of the controversy, it is resolved to this one simple demand from the roads, "Let us alone." Putting aside the artful dodging, the prevarication, the substitutions and evasions, we find them at last seeking sole and unlimited empire: to set aside every restraint, to elect governors, to subsidize legislatures, suborn juries, and corrupt courts and judges.

No doubt the stock and bondholder desire and deserve a fair return on their investment, but let them look solely to the corporators, to whom they loaned their money, or to whom they trusted

its use, and not to the state which has neither received nor used their money nor guaranteed its payment.

The premises upon which the liability of the state to pay, in a given contingency, rest, exist only in a legal fiction originated in the fertile brain of a railroad attorney, and the conclusion is so far fetched, that a microscope could scarcely reveal the attenuated connection.

Finally, the conclusions from past experience, may be summed up as follows:

1. The public character of railways is fully established.

2. Both the right and necessity of legislative and executive control and supervision are in no sense doubtful.

3. Control and supervision are demanded by the public interests. It is impossible to presume, under any conceded power of good government, that interests so vast and manifold as to involve the fundamental conditions of public progress and prosperity, should be surrendered to the undisputed caprice of a personal discretion, based solely upon considerations of private or corporate profit.

4. Control and supervision are also demanded in the interest of capital; a railway bond or its stock should be as valuable as that of the state; they should no more become worthless, and the foot-ball of speculative machination, than the currency or bonds of the United States, and to secure this steadiness of value requires general laws based on constitutional provisions.

5. The necessity for this control and supervision is a growing one. The rapidly accumulating knowledge of speculative and fraudulent methods in railway construction and management, has almost destroyed public faith in such securities, and to call them "securities" is a glaring misnomer; such causes have fatally injured the interest of investors in railway stocks and bonds. It is a noteworthy fact, not to be ignored in this discussion, that railway investments have appreciated under "granger legislation" so-called, in Wisconsin.

In conclusion, we are led to ask and answer; upon what basis should rates for passengers and freight be reckoned?

1. Actual cash value; or what it would cost to replace the same property, at the time of assessment, in ready money.

2. By limitation of actual profits. The net profits determine the value of railway stock to the holder, seeing his interest and final payment depend on them, and to reach a just determination of their limits requires a full knowledge of actual value and operating expenses; necessitating complete reports from railways of all matters relating to construction and operation.

ESSAY FIVE.

THE AMERICAN REPUBLIC.

THE discovery of America signalized simply a new starting point in the history of the human family,—the continuous life of different elements of the old world, transferred to a new ground, with new climatical and other conditions—the formation of a new society and the organization of new states, but not without the assistance and employment of the instruments of civilization, invented and created during hundreds and thousands of years, and augmented or perfected, by the genius and energy of new settlers in a new and isolated country.

This event happened at a time when many circumstances worked together for its final consummation—when the marvellous stories of the great Eastern traveler, Marco Polo, had spread over all Europe, calling forth and stimulating enterprises of discovery in every speculative mind,—when the doors to Asia were closed by the power of the Mussulmans and their conquest of Constantinople,—when their fanatical hordes had advanced to the shores of the Adriatic, and even as far as the city of Venice itself, devastating, depopulating and enslaving the country through which they passed;—when their piratical fleets and vessels began to infest the Mediterranean Sea; and Venice, to maintain her monopoly of trade with the Orient, became tributary to the Sultans of Constantinople, of Asia Minor and Egypt.

It is not strange that the states of Western Europe, shut out from all overland routes to Asia, and out-rivaled by Venice, turned their eyes with eager hopes towards the setting sun, to seek a new and unmolested passage to the golden gates and the spices of India and China.

And they found it, but not without striking on their way the little Island of San Salvador, and thereby giving a new Continent to the Old World, grown lame by poverty, bigotry and despotism. It was reserved to Italy to furnish the great discoverer and the explorers of America—Columbus, Americus Vespucius and the Cabots—who, although hired to Spain, to Portugal, to France and to England, were nevertheless Italians; and the palm of the first all-important victories won in connection with this hemisphere principally belongs

to them. It has become the custom, of late, to impeach the character and the achievements of Columbus,—to say that he was a pirate, an impostor and humbug, a literary counterfeiter, a perjurer and religious fanatic, as Aaron Goodrich tells us;—that he assisted in seizing by force and robbing Venetian galleys, changed his name, Griego, into that of Christoforo Colombo, to give himself the air of a Christian hero, a "Christ-bearer" and harbinger of fortune; that he stole his new ideas from a Spanish pilot, Alonzo Sanchez, and an Italian astronomer, Toscanella, and that he afterwards falsified his reports and became the fanatical oppressor of the poor Indians, a slave-hunter and money-monger, etc:—but whatever may be said against him the one great fact is undeniable and unimpeachable that, after years of begging and praying, of argument and demonstration, he succeeded in commanding the first trans-atlantic expedition, organized and fitted out at Palos through his own exertions and for himself; that he set sail with the firm and never swerving purpose of reaching the heralded land by the western route, and finally succeeded in spite of the embarrassments, sufferings and troubles in his way. And even supposing that America had been known to the ancients, and rediscovered by the Irish and Northmen, and visited at about the end of the fourteenth century by a party of fishermen from Iceland, all practical connection of former times—if it ever existed—had been lost, and was reëstablished by the boldness and success of the Italian navigator.

As Columbus had entered into practical life as a mariner when he was only fourteen years of age, it can not be supposed that he had acquired a thorough scientific education; but it must be admitted that by many years of experience on the ocean, by his travels and his connection with men like Toscanella, Martin Behaim and Perestrello, by his sojourn in Portugal and Spain, and his stay at Madeira, he had acquired such experience, and had come into possession of such facts and knowledge as were sufficient, in his opinion, to warrant his enterprise.

He was, like Garibaldi in our day, a practical man rather than a scientist; a man of smartness and boldness, rather than of theoretical education; an adventurer and man of the world, rather than a savant and literary student. But as it needed a practical man, a man of the courage and heroism of a Garibaldi, to realize the ideas of a Mazzini, and to add the power of the sword to the power of the pen, so Columbus struck out to the high sea, equipped with the sailing vessel, the compass, the astrolabe and the log-line, to test and real-

ize the ideas, notions, and speculations in regard to the new route o Asia.

By his maritime strategy he outflanked the Portuguese, who had already reached and doubled the Cape of "Todos los Tormentos," or Good Hope, just as they, the Portuguese, outflanked the Venetians; but we must also admit that he owed his success to the very fact of his ignorance in regard to the magnitude of the globe, and the existence of America, for no one will believe, to-day, that with his miserable caravels and poor outfit, he could ever have traversed both the Atlantic and the Pacific in one uninterrupted tour. The discovery of America was, therefore, in this respect, a great accident, and not the result of mere mathematical or geographical calculations, based on a correct knowledge of the dimensions of the globe and the extent of Europe and Asia.

Italy, in the fifteenth century, far advanced in civilization, in politics and mechanical skill, was the very focus of new ideas, the "fatherland" of Boccaccio, Dante, Petrarca, Ariosto, Tasso, Leonardo da Vinci, Michael Angelo, the Medicis, Dorias and Zenos; of Machiavelli and Guicciardini; the "*alma mater*" of Copernicus, Regiomantanus, and many other illustrious minds; the head and heart of mediæval civilization, with free cities like Genoa and Venice, Florence and Pisa, which had, under republican governments, become the representatives of liberty, of science and art, of power and splendor; Savanarola had then nearly finished his career as a martyr of politico-religious reform, and Porcari had fallen within the city of Rome which he had tried to restore to the people. It may seem strange that this great nation, which had twice risen, Phœnix-like, from the ashes to wonderful power and fame, whose commercial stations were scattered over the coasts of Europe, Africa, Asia Minor and the shores of the Black Sea, took so little part in the direction of affairs in America after the new high-road by the sea was found, and a new world was opened to enterprise and commerce; but in examining her condition at the close of the fifteenth, and during the first decades of the sixteenth, century, we see her condemned to a series of terrible calamities and troubles, ending with total dismemberment, political impotence, and social ruin. While the most serious dissensions existed in the ranks of her own people, the Turks threatened and pressed her from the East, and robbed her of one commercial station after another; the kings of France pounced upon her, like ferocious beasts, from the West; the Swiss and Germans from the North; the Spaniards landed in the South, and the Pope completed the work of

ruin from within. Her refinement, culture, and wealth, had excited the envy of foreigners, who, compared with her own citizens, were really little more than semi-civilized barbarians. Such a condition of things was not favorable to an interference, on her part, in the affairs of a far distant country. There were other reasons, also, which prevented Italy from taking a more active part in trans-atlantic expeditions, the most important of which was, that while on the Western coasts of Europe the sailing vessel had been in general use, the Italian cities, represented in commercial affairs by Genoa and Venice, almost exclusively depended on the rowing vessel, or galley, very well suited for coast service and for expeditions with intermediate stations, but totally unfit for trans-atlantic operations. And yet, here and there, we find the Italian name connected with American history, as, for instance, in the colonization of Brazil, in the participation of the Italian veteran Chevalier de Tonty in the expeditions of La Salle in Canada and the Mississippi Valley—in the establishment of a little colony at New Smyrna in Florida—then, during the revolutionary period, in the beautiful odes of Alfieri, and afterward in the classical history of Carlo Botta.

By mere chance, then, and not by right of discovery, Spain stepped in as the heir and executor of the Italian legacy, and took practical possession of the islands and coasts of the Gulf of Mexico and the coasts of the Pacific Ocean, while Portugal possessed itself of the Eastern coast of South America, and France of Canada and the Mississippi Valley. If we look back to the Spanish conquest and colonization of America, we are at once reminded of those iron-clad and iron-hearted hidalgos and conquistadores who planted their haughty banner on American soil in the name of the Cross and Crown, with an insatiable thirst for gold and silver. There they are, the heroes of Spanish-American conquest—Cortez and Narvaez, Balboa, Pizarro and De Soto—with their invincible legions and their undaunted courage and almost superhuman endurance, but also with their political and religious fanaticism and their cruel avarice; there they are, following the footsteps of the great discoverer, their swords trickling with the blood of the Moor, and their hearts filled with hatred against the heretic Jew!

They were only the life-pictures of the fanatical bigotry, the haughtiness and gallantry, existing at and about the time of Ferdinand and Isabella; and we must not, therefore, be astonished to find that, to persecute and to slaughter in the name, and for the glory, of the "holy faith" and their kingly rulers, was by them not regarded

a crime, and that the same chain which they had forged for the neck of the poor heathenish Indian was afterward, "as an act of grace to the red man," put upon the neck of the black. From that time until now, Spanish policy in America has been constantly the same: the policy of suppression and spoliation, of death and desolation, and it has never been relinquished save when set aside by force of arms in successive revolts and revolutions. So it was in Central and South America and in Mexico; so it was in Santa Domingo and so it is, and probably will be, in the Island of Cuba. Even in our own country there could be no rest and no peace, until we had destroyed that pestilential inheritance from Spain—negro-slavery.

But in spite of all these lessons and all the terrible facts of history, the American Republic stands at this very moment, and has stood for many long years, deaf and dumb before the barbarities of the Spanish henchman, and sees a heroic people perish in the defense of the same principles for whose vindication we have sacrificed a million of men and thousands of millions of treasure. And Spain herself, renowned and great by the valor and devotion of her people, by her own struggle against the Roman legions, the Moor, and the French invader, by her literature, art and science, by the untiring efforts of an intelligent minority to substitute the principles of liberalism and republicanism for those of despotism and bigotry; Spain will never be free and prosperous until she relies more on her own resources than on those of her trans-atlantic possessions, which she is unable to maintain and to rule in peace.

Turning from this dark picture of Spanish-American conquest and infamy, and casting a rapid glance at the affairs of the Portuguese on the coast of South America, we find that, although the genius of Portuguese navigators and pilots was far superior to that of Spain, the policy of Portugal was not different from that of her cruel sister, and the condition of her colonies became such as to present a veritable pandemonium of wild, heterogeneous elements; red, white and black, natives, imported criminals and kidnapped negroes; a reign of mamalukos, mulattoes and cafuzos, held in check by the senhor of the "pure blood." In his history of the Rise and Decline of Commercial Slavery in America, Edward E. Dunbar says:

"At the outset the Portuguese equaled, if they did not excel, the Spaniards in their cruel treatment of the natives, who were at once enslaved on plantations. Negroes were preferred, however, as they proved more capable and enduring. The Portuguese ransacked the country from end to end to capture Indians and keep up the supply of slaves in the mines. The depopulation of Brazil then went on at a

fearful rate and in a few years the natives ceased to form an element of any great value in the labor of the country. Something more than two millions of the Brazil Indians must have been enslaved and destroyed by the Portuguese and other European nations before the middle of the eighteenth century."

What Dunbar says, is certainly not exaggerated,—in the course of time this condition of things changed for the better, and to-day we see the independent empire of Brazil slowly but decidedly marching on in the great highway of emancipation, liberty and enlightenment.

If the decree of Pope Alexander VI. had prevailed, the American Continent would have become a Spanish province; but fortunately, not only Portugal, but France, England, the Dutch and the Swedes, very soon entered into practical competition with the Spanish conquerors, and while the French began their operations in Canada and in the Mississippi Valley, the English, Dutch, Scandinavians and Germans settled, slowly, but securely upon the Atlantic coast, forming the very germ and nucleus of what is now the United States of America. Then came a period of intrigues, of actual wars and battles, ending with the triumph of England over all her rivals and enemies on the North American Continent, and the supremacy of English law and the English language in all her colonies—original and acquired—on the coast of the Atlantic ocean. Except for this early success of England in America, the American Republic would have been impossible, not only because England was a great and powerful nation, well prepared to protect and defend her transatlantic colonies, but also for the reason that England in the seventeenth and eighteenth centuries represented more than any other of the great European nations the democratic principle of self-government, while the English language alone was capable of uniting the Germanic, Celtic and Latin elements easily and quickly under one government, and into one great commonwealth.

By a coincidence of most fortunate circumstances it so happened, that while every where else on this continent the despotic and bigoted government of France and Spain held unrestricted sway over conquered provinces, here, on the Eastern slope of the Alleghanies, grew up corporations and colonies of quite a different sort. Instead of the hidalgo and filibustier, the wild speculator and adventurer, the friar and the Jesuit, there came the Puritan and the Quaker, the Huguenot, the Dutch Reformer and Swedish protestant, the Moravian and Baptist, the German Lutheran and refugee from devastated Palatinate, Alsace, and Southern Germany. In fact, the most persecuted, but also the most liberal, elements of European

society sought shelter and a new home in the New World, and finally succeeded, by their energy, self-reliance and faith, by their love of liberty and love of labor, in building up new communities, cities, and states, and in laying the foundation of a powerful empire as a counterpoise to despotism, suppression, and religious intolerance; and as if to prepare those new-formed colonies for the coming struggle against the mother-country itself, the warlike qualities of the settlers were aroused and made effective in a series of preliminary wars, of wood and swamp-fights, of battles and sieges, for which they, the colonists, furnished their own men and money, gaining for England, by their assistance and valor, the most substantial victories. So it was, for instance, during King Philip's war from 1675 to 1676; in the expeditions against the French fortress of Port Royal, in Nova Scotia, 1707 and 1710; in the campaigns of Oglethorpe against the Spaniards in Georgia and Florida; in the two remarkable expeditions against Louisburg in 1745 and 1757; in the French and Indian war, and especially in the last memorable campaign against Canada, which ended with the battle on the Plains of Abraham, where the fate of France, in regard to this continent, was decided; and finally in the defense of Detroit and the capture of Havana, which city was afterwards exchanged for Florida. There was selected, by fortunate circumstances, one of those provincial soldiers of Virginia—a scout commander in the wilderness of the Alleghany and Monongahela,—a surveyor and militia-man, an aid-de-camp during Braddock's defeat—George Washington, who prepared himself in these warlike enterprises for becoming in due time the military leader and defender of the revolutionary coalition, and to stand foremost as one of the saviors of his country.

It is true that many of those who had left Europe on account of religious persecution inaugurated here the same system of intolerance which they had abhorred in their own country. Of this inconsistency, we find the most striking examples in the affairs of Massachusetts, Connecticut, Rhode Island and Maryland, in the politico-theocratic government of the two first named colonies, in the banishment of Roger Williams and Anna Hutchinson, the voluntary exile of William Coddington and his followers, and even in civil war between the numerically more powerful protestants and the disfranchised catholics of Maryland. But these very dissensions, persecutions, and struggles led also to most important results, even before the great question of toleration was decided, at the end of the thirty years' war, through the peace of Westphalia; it led to the separation of church and state

in the Providential Plantation in 1636, *i. e.*, the recognition of the maxim of Roger Williams, "that the civil power has no control over the religious opinions of men;" it led to the all important declaration in the charter of incorporation of the United Plantations, by which, in 1647, "freedom of faith and worship was assured to all;" to the Toleration Act of Maryland, in 1649, and the "Great Law" of Pennsylvania, in 1682, which declares, "that no one believing in one Almighty God should be molested in his religious opinion," making, however, "faith in Jesus Christ" a necessary qualification for voting and for holding office.

These preliminary struggles, this substitution of "Almighty God" and "Jesus Christ" or the holy Scriptures, as in the Colony of New Haven, for Pope and Bishop and the tyranny of sects, were the natural and necessary conditions of that further progress and policy, which resulted, in the course of time, in the indirect declaration of absolute freedom of worship through the fundamental law of the United States. And while this process of religious emancipation was going on, political resistance began against the guardianship of England herself, against the despotism or incapacity of some of her colonial rulers, resulting in opposition like that against Governor Andros, and even in open insurrection, like that of Nathaniel Bacon and Jacob Leisler. Then another question, which, since the first Navigation Act in 1551, had been a disturbing element in the life of the colonies, came into the fore-ground. It was the financial question, the question of "free shipping" and "free fishing," of free inter-colonial commerce and navigation, of duties on exports and imports, and of internal taxation, leading to a general and determined opposition against the Stamp Act, to the cry of no taxation or legislation without representation, to the "Declaration of Rights," the "Committee of Safety," the organization of the "Sons of Liberty" and "Minute Men;" developing, within the period of ten years from 1765 to 1775, into open revolt and bloodshed; and culminating finally in the "Declaration of Independence," in secession and war. The result of all this was the emancipation of the colonies from the political control and government of England, the formation of an independent federation of States, and the adoption of the federal constitution. The war of 1814 was nothing more than the completion of that emancipation which had been inaugurated in 1776, and ended with the victory of New Orleans, in perfect enfranchisement from international supervision, and commercial independence.

By virtue of this great consummation, the colonies passed the

threshold of a new era. The young Republic, born in the fires of the revolution, and maintained by two great wars, stepped into the ranks of the nations of the world. The whole Atlantic coast, including Florida and Louisiana, belonged to her. She had proved her political ability and her military power on land and sea, had acquired an immense territory, increasing from decade to decade until it reached from ocean to ocean, and from the great lakes to the Gulf of Mexico, and had thrown her doors wide open to the crowded millions of the Old World. And they came—first by the hundred, then by the thousand and hundred thousand; but they did not come as the Goths and Vandals and Huns came into Southern and Western Europe—like an irresistible avalanche, with all the instruments of despotism and war, plundering and devastating and supplanting the old order of society by feudal masters and feudal laws;—nor did they come as the Saxons and Normans came to England, to subdue and absorb the native population, and to substitute their own language, political machinery, laws, and habits, for those of the conquered;—they did not come as the Moors came into Spain, to conquer, and dominate for centuries, to spread terror and light at one and the same time, and to disappear again, leaving behind only the ruins of their former power and not more than two thousand of their own words in the language of the Spanish people;—they did not come as the Mussulman came, to destroy by fire and sword the lands of the Byzantine Empire, to force upon the followers of Christ the lessons of the Koran, and to maintain Asiatic despotism in the midst of heterogeneous elements, unwilling and unable to adopt or submit to a political, religious and social system totally antagonistic to European civilization;—nor did they come as the Spaniards came to these continents and islands, to rule and ruin and enslave; but they came as refugees and exiles, to seek shelter and freedom from tyranny and oppression under a republican government and republican laws already existing; they came as laborers, workmen and mechanics; as teachers, scientists and artists, to earn their daily bread "in the sweat of their face;" they came, armed with the instruments of peace and civilization, not to conquer and subdue, but to live, to work and to grow among a people and in a society, too strong to be overwhelmed and supplanted, and too weak to refuse them, or even to exist without them; they came as civilized man comes to civilized man, not only submitting voluntarily to the existing political system, but also adopting the language of the people that received them. They did not come as the torrent comes, suddenly, with all its terrible powers, destroying, upsetting

and upheaving everything in its way; but they came as the flood of the Nile comes, slowly and from year to year, spreading out and fructifying and beautifying the country far and wide. This is the great secret of the rapid progress and success of American society; this slow, natural and gradual assimilation of European, and therefore homogeneous, elements; this vast expansion of millions of new-comers, all embraced in the folds of one general government, and led by one preponderating, able and energetic element,—the *Anglo-Saxon.* Nor could any other language than the English suit so well all these different nationalities, because it was the only European and highly developed language, which contained in its composite body the elements of the Germanic and Latin tongues, while the Irish people had already been won over to it and educated in it. They all found themselves naturally led to the adoption of this common medium, which would not have been the case, in the same measure, if the Spaniards, French, or Germans had obtained the preponderance at the first organization of a common government.

There was another circumstance of great importance and far-reaching influence in the development of the American people, which it is necessary to consider. It was by this immense influx of European immigration during a period of twenty years, from 1840 to 1860, which took its principal direction to the Northern part of the United States, and was composed of the dissatisfied, liberal, and revolutionary elements of Western Europe,—that the "Free States" obtained such an overwhelming preponderance over the South, as to make the election of Abraham Lincoln, the overthrow of the Southern Confederacy, and the final abolition of slavery, possible. Without this immigration, and this numerical and moral superiority of the North, such a total and radical revolution would not have taken place, at least, during this century, in spite of all the fulminant speeches made, the books and papers written, and the anathemas pronounced against the cruelty and obstinacy of Southern slaveholders. In this respect, therefore, the immigration "*en masse*" was "fatal" to Southern institutions, as it served as a lever to the anti-slavery element, and hastened the disintegration of the slave-holding power. However, the deed is done; the Gordian knot is cut; the "irrepressible conflict" is over, and what seemed "fatal" was simply an acceleration of a necessary process, which, sooner or later, must have led to the same result; the reorganization and reconstruction of the American Republic on its original basis of human rights and

liberty, and in accordance with the enlightenment and progress of our age.

From such a sudden and radical change, connected with a gigantic civil war of four years, extraordinary conditions arose; such as concentration of power in the hands of the dominating and victorious party; a total upsetting of the former political equilibrium by the elevation of the negro race, and its introduction into the political arena with all the rights and privileges of American citizenship,—which element was used as a political lever in the South, as the foreign element was used in the North before and during the war. Then came the creation of a large debt and the growth and wide-spread organization of a shoddy aristocracy, with all its corrupting influence on legislators and executive officers, with an era of military and carpet-bag rule in the Southern States. Besides this, there was an enormous increase of current expenses, in the machinery and personnel of the federal government; a proportionate increase of executive influence and patronage; oppressive taxation, almost bleeding the people to death; and, allied with it, a revenue system which, in a single moment, opened every house and counter of this wide domain to the relentless power of the tax-gatherer, and transformed American citizens and soldiers into secret agents, spies, and political drummers and runners. There was, in brief, a total revolution in politics, as well as in the practical administration of public affairs, and in the life and habits of the people. And even now, at this present hour, after experiencing such great changes for good and evil, while trying to recover from the effects of a terrible war, and a financial collapse almost equal to general bankruptcy, new and momentous questions are thrown upon the poor and dissatisfied masses; the spirit of intolerance rises again, in double-headed form, and the President himself points with great emphasis to the coming danger of a religious war, while at the same time the disgraceful exposure of the venality of some of the highest servants of the people shocks the whole civilized world, provokes its sneers, and makes every true American heart bleed, if not almost despair of Republican institutions.

But, after all—the world is moving—"*e pur si muove.*" Let us look around and gather strength and new courage from what we see.

What a wonderful change since the days of Columbus and Cortez—what a contrast between now and then! The Old World, reformed and regenerated, totally revolutionized and reorganized; Italy regained, with almost every foot of Italian soil, and united under an enlightened and progressive government, with liberated Rome as her

center, and bearing on her banners of freedom, the illustrious names of that stern, uncompromising, and self-sacrificing republican, Joseph Mazzini, the great campeador and liberator Garibaldi, the consummate statesmen and diplomat Cavour, and the good and noble king Victor Emanuel!

France, after four centuries of wars and revolutions, of blood and tears, of glory and defeat—republican again, for the third time within less than a hundred years, but this time with a fairer prospect than ever, that she will remain so.

Germany, a great empire—the long cherished hopes of her patriots and martyrs realized, at least in a great measure, and steadily progressing in the path of political, social and religious reform, while Austria has thrown off "*nolens volens*" the papal yoke and the hereditary policy of reaction, and is fulfilling her mission of guarding and protecting the doors to Western Europe, as she has done in the past, with the assistance of the Magyar and the Pole.

Russia, four centuries ago one great battle-field of heterogeneous elements and half-barbarian chieftains, and scarcely beginning to consolidate its isolated and widely separated parts, grown up to an organized state of eighty-five millions of inhabitants, with an immense power and territory, touches the Baltic in the West, meets the Pacific in the far East, and stretches out toward the South-East as far as the head-waters of the Oxus and Iaxertes. To-day, she is driving before her the Tartar and Mongolian, as they were driving her in the fifteenth century. By a political and commercial strategy, grand in conception and wonderful in execution, she has reopened the old lines of communication established by the Genoese, Venetians and Armenians, from the emporiums of the Black Sea, through the Caucasus, or by the Don and Volga to the Caspian Sea, and from thence to Persia, India and China. If she continues as she has begun, the end of this century will not only see her vedettes crown the heights of the Hindoo-Koosh, and her Eastern high-roads crowded by the caravans of Western merchants, but also an iron girdle, reach from Moscow and Petersburg, to the lake of Baykal in Southern Siberia. While Russia is thus working out her gigantic plans toward the far East, the "Celestial Empire" has been opened from the West to the commerce of the world. Marco Polo has made his appearance again, but this time with the iron tongue of persuasion, and a passport written with the point of the bayonet. The United States has spanned the Isthmus of Panama and the immense territory between the Atlantic and the Pacific, with appropriate Yan-

kee hoops, and has paid the first great visit to Japan, equipped with the fiery horse and the electric battery.

As to the two greatest and most dreaded powers of the fifteenth and sixteenth centuries,—the Turk and the Spaniard,—we find them just finishing the cyclus begun at those times:—the one, by slowly but surely receding from Europe into Asia, from whence he came, the other by having been driven out of the Netherlands, Germany, France and Italy, and by having lost all his important possessions in America except the two islands of Cuba and Porto Rico, from which it is probable that he will also recede after a little time.

And England, whose vessels before the year 1577 could not appear in eastern waters except under the flag of France, has become the mistress of the sea, the "Empress," or as Max Müller styles her—the "Adhiraja" of India,—the mother and grandmother of many children and children's children, and has nourished and brought up on American soil a giantess, more robust, more prolific and promising, than any of her other offspring. Step by step and favored by one victory after another, England has successively and successfully put herself in the place of the Hanseatic League, the Dutch and Portuguese, the Spaniards and the French, and now she takes hold of the Suez Canal and the mouth of the Euphrates and Tigris, to keep pace with the Russian Bear in his onward march towards the waters of the Indus, while she plans a new confederation in Africa, and sticks firmly to her possessions in West India and Central America, to control the Caribbean Sea and the Gulf of Mexico.

So the great movement is marked by incessant struggles, but also by continuous progress and reform. Even the fate of Spain and Turkey shows clearly and unmistakably the invincible force of human nature and human aspirations, which ever and ever breaks forth and revolts against oppression and abuse, until the day of deliverance arrives.

Amid all this progress, what of the American people?

Shall they alone stand still, or even go backward? Shall this Republic, the beacon-light of humanity, the last hope of the toiling millions of the Old World during many years of tyranny and oppression, become the prey of pirates, cliques and rings, and never recover? This new Atlantis, surrounded and protected by the vastness of the ocean—this wonderful country, with all its inexhaustible resources, its majestic mountains and rivers, its railroads and telegraphs, its great political institutions, its free press of more than four thousand batteries, spreading out the light of intelligence and

information among more than forty millions of inhabitants;—with its free schools and religious freedom, the universality, the intelligence, skill and energy of its citizens—shall it remain what it has been, or shall it become degenerate and corrupt? Shall it resist the storms of time and the corroding influences of egotism, extravagance and corruption, or will this present unfortunate condition of affairs become permanent, and the close of another century look down upon the ruins of a once mighty and prosperous nation? We believe that through the strong common sense and patriotism of its people, it will stand firm, resist and conquer. Republics must have their time of development, as monarchies have had theirs; they must pass through a series of trials and experiments, to find the system which harmonizes best with their particular conditions, aims and ends, and when moved from the same, they must, from time to time, by the process of reform or revolution, return to the basis upon which they were founded, employing the great lever of popular sovereignty to remedy the evils of the hour. At this very moment the most important questions are to be solved. We are upon the eve of a Presidential election, as important in its bearings on the future of the country as any that has preceded it. The people have to consider the financial question, the school question and religious question; the question of civil service reform, of immigration and international commerce, and the Spanish-Cuban question. We must meet them manfully, conscientiously and patriotically. We must meet them as the founders of this Republic met the questions and dangers of their days, in the spirit which prompted them to stake upon the issue their lives, their fortunes and their sacred honor. We must understand that, whoever may be carried to the Presidential chair, to fulfill his mission, must have the support of good and patriotic men; must treat with impartiality, the North and South; and his policy must have the sympathy of the masses of the people, and be in harmony with the cosmopolitan character of our Government.

We have not only to maintain and protect, but also to reform and develop our public school system, so as to make it acceptable to all classes of society, without reference to religion or nationality; and while we should, on one side, be on our guard against all undue influence and interference of the monarchico-hierarchical power of a foreign church, in matters of education and politics, we have, on the other side, to respect the principle of religious toleration, and discountenance dark-lanternism and political ostracism on account of religious belief.

We have to reform our civil-service and to punish the traitor of public trust and honor, whatever be his station. But while demanding that honesty shall be the first quality of a public officer, we are to bear in mind the fact that honesty is greatly and constantly imperiled without stability and security in public, as well as in private position; that the maxim of "to the victors belong the spoils," originated by President Jackson and applied in our politics since his day in spite of all remonstrances and efforts to the contrary, and the system of "rotation in office," favored and publicly defended by Andrew Johnson, have worked like a deadly poison on the body politic of the nation, and corrupted the sense of honor and morality in hundreds and thousands of our people. How can we expect our public officers to be honest, while the sword of Damocles is suspended over them, continually threatening the termination of their official life? When, in spite of all endeavors to do right, to fulfill their duties faithfully and so become stronger by professional experience, they are pressed out or thrust out of position like so many dogs, by some favorite who would make room for other favorites? Can such a summary and infamous process enhance their feelings of honor, of justice, of right? Surely it is vain to hope that we may be rid of this poison, until we are rid of the system which creates it.

We can neither suppose nor desire, that the elective power, vested in the people, shall be abolished; or that the President of the United States, the members of his Cabinet, and the foreign ministers representing the policy of the Government and the party in power, or the high officials of states and municipalities, may not be changed periodically in accordance with the provisions of their respective constitutions and laws; nor can we admit, that it will be impossible to find men able and honest enough to fill high positions of trust and honor; but we must insist that the example of honesty, self-abnegation and patriotism, shall be found and taught in high places, and that no subordinate officer be subjected to ignominious removal from position, unless by a procedure not dependent on political patronage and favoritism. The division of the spoils by the party in power for political or personal services rendered, and the exclusion of the minority from the public business, is nothing less than a system of indirect bribery and injustice, which leads to the formation of conspiracies and rings, to a kind of modern feudalism which absorbs and appropriates that which belongs to the *whole* people, for the exclusive benefit of a ruling class.

In regard to the financial question we must remember that, to give up the "metallic basis," would be to throw away a very decided advantage which the United States possesses over other countries, in the production of gold and silver; but at the same time we should not enforce a financial policy leading to the ruin and strangulation of the middle classes, and the concentration of the monetary power in the hands of a relentless minority of capitalists and great corporations.

In this modern struggle for national strength and superiority, all our forces should be united. Whatever may be our political differences, there should be one paramount idea controlling every true American, native or foreign born; that this country is our home, now and forever, in adversity or prosperity; that we must identify ourselves with it, live and work for it, promote its welfare and facilitate the process of its growth, in the course of time, into one homogeneous nation, represented by one general government, standing on one and the same national constitution, and recognizing one language, the English, as a *national* medium. We are to solve the problem as to whether so many and different elements of race and nationality can live together in peace and harmony, and develop, as integral parts of the nation, their characteristic faculties, without serious dissensions and conflicts. It is impossible to decide *a priori* a question which, by the evidence of over four millions of colored people in our midst, and the influx of the Chinese from the West, has undoubtedly become one of great importance, but from the past we may draw certain conclusions in regard to the future, and form our opinion accordingly. And in this respect we have found that, in spite of negro-emancipation and the eight and a half millions of immigrants which have arrived in the United States from 1820 to 1875, peace rules in the land and there is not a State in the Union in which the English-speaking population has not maintained or gained superiority over every other. We can not close our eyes to the significance of this fact. In spite of spasmodic efforts to reverse this order of things, by natural laws and, as it were, by epidemic influences, a continuous, irresistible assimilation is going on; and physically, socially, and intellectually, the Republic advances slowly but surely in the pathway to a more complete unification.

Those who, like the Germans, French, and Italians, are proud of their own nationality, may be pained in the thought that it is lost in America; but such a supposition is somewhat chimerical. The process of assimilation is mutual, general and unexceptional. It relates to the "Yankee" as well as to the man from Tipperary, to the Italian

and Frenchman and the German, as well as to the native-born American of the West or South. No one, who is living in the midst of American society, can escape the influence of those around him. Wherever we are and go, we see the influence of foreign science, art, literature, labor and industry, and of foreign habits and customs; we find it in political life, in the workshop, in our institutions of learning, and even in the English language, which expands and enriches itself as the general receptacle of new ideas and new forms of expression. What is good and great and noble in other nations, has begun to find its way into the mind and heart of the American people, and will live and bear its fruits long after the present generation has ceased to exist.

Once aware of the astonishing strength, and the many advantages, lying in the existence and application of such multifarious forces for the benefit of the whole people, we must come to the conclusion that national unity, power, and greatness, will be best promoted by avoiding any policy of suppression or intolerance which shall rudely interfere with the individual habits and inborn qualities of those who have chosen the American Republic as their adopted country, because such a policy must necessarily lead to antagonism, separate organizations, and obstinate resistance. Rather must we believe that it is by the greatest possible social, political, and religious freedom, by the enlightening and equalizing influence of a common education, by the power of common interests and by awakening in their minds the full consciousness of a common destiny, that we are to attain to that unity as a people, which is a condition to our success as a nation. We must remember that the days of adventure and mere good luck are passed; that we have to compete with other great nations in the race for national life, commerce and prosperity; that the Mediterranean Sea has become again a great center of commerce and enterprise, fostered by new lines of communication with the East, and by the rising power and prosperity of the land of the Pharaohs under an enlightened and energetic Mohammedan prince; that emigration has ceased to be a great factor of our national wealth and progress, at least for the present, and that we have to regain what we have lost, by a wise policy and by honest thought and hard honest work.

If there are any utterances specially appropriate to the great task before us, they are those which breathe the spirit of the sturdy and heroic English soldier at the battle of Trafalgar:—to apply the words of Nelson to our own situation—*The American Republic expects every man to do his duty.*

FRANZ SIGEL.

ESSAY SIX.

INDIAN CITIZENSHIP.

THE proper treatment of the Indian question requires that we deal with the issues arising out of the peculiar relations of the aboriginal tribes of the continent to the now dominant race, in much the same spirit, profoundly philanthropic at bottom, but practical, skeptical, and severe in the discussion of methods and in the maintenance of administrative discipline, with which all Christian nations, and especially the English-speaking nations, have learned to meet the kindred difficulties of pauperism. It is in no small degree the lack of such a spirit in the conduct of Indian affairs which has rendered the efforts and expenditures of our government for the advancement of the race so ineffectual in the past; and for this the blame attaches mainly to the want of correct information and of settled convictions respecting this subject, among our people at large. So long as the country fluctuates in an alternation of sentimental and brutal impulses, according as the wrongs done to the Indian or the wrongs done by him are at the moment more distinctly in mind, it can not be wondered at that Congress should be reluctant to undertake the reorganization of the Indian service on any large and lasting plan, or that the Indian Office should hesitate to cut out for itself more work than it can look to make up in the interval between sessions.

What, to take a recent and memorable instance, would have been the fate of any scheme of Indian legislation, which was at its parliamentary crisis when the massacre of General Canby occurred? The work of years might well have been undone under the popular excitement attendant upon that atrocious deed. Yet it would be quite as rational to denounce the established systems for the care and control of the insane, and to turn all the inmates of our asylums loose upon the community because one maniac had, in an access of frenzy, murdered his keeper, as it would have been to abandon the established Indian policy of the government, the only fault of which

is, that it is incomplete, on account of anything that Captain Jack and his companions might do in their furious despair. The more atrocious their deed the more conspicuous the justification of the system of care and control from which this one small band of desperadoes had for the moment broken free to work such horrid mischief. Yet there is much reason to believe that had the Indian service at that time depended. as every service must once a year come to depend, on the votes of Congressmen, it would have failed, temporarily at least, for the want of them. Nor is it only acts of exceptional ferocity on the part of marauding bands which have sufficed to check all the gracious impulses of the national compassion. The reasons which have existed in the public mind in favor of the Indian policy of the government have not always been found of a sufficiently robust and practical nature to withstand the weariness of sustained effort, and the inevitable disappointments of sanguine expectation ; and thus the service has at times suffered from the general indifference scarcely less than from the sharpest revulsions of public feeling.

Much has been said, within the past three years, of the Indian Policy of the Administration ; and if by this is meant that the policy of the government in dealing with the Indians has become more and more one of administration, and less and less one of law, the phrase, with exception of an article too many, is well enough. As matter of fact, the sole Indian policy of the United States deserving the name was adopted early in the century, and it is only of late years that it has been seriously undermined by the current of events, while it is within the duration of the present administration that the blow has been struck by legislation at the already tottering structure which has brought it nearly to its fall.

To throw upon a dozen religious and benevolent societies the responsibility of advising the Executive in the appointment of the agents of the Indian service is not a policy. To buy off a few bands, more insolent than the rest, by a wholesale issue of subsistence and the lavish bestowal of presents, without reference to the disposition of the savages to labor for their own support, and even without reference to the good or ill-desert of individuals, this, though doubtless expedient in the critical situation of our frontier population, is the merest expediency, not in any sense a policy. Yet the two features specified have been the only ones that have been added to the scheme of Indian control during the continuance of the present administration, while, on the other side, an irreparable breach has been effected in that scheme by the action of powerful social forces, as

well as by the direct legislative contravention of its most vital principle.

From the earliest settlement of the country by the whites, down to 1817, the colonies, and afterwards the thirteen states, met the emergencies of Indian contact as they arose. The parties to negotiation were often ill-defined and the forms of procedure much as happened. Not only did each colony, prior to 1774, conduct its own Indian relations, generally, with little or no reference to the engagements or the interests of its white neighbors; but isolated settlements and even enterprising individuals made their own peace with the savages or received the soil by deed from its native proprietors. Nor on the part of the Indians was there much more regard for strict legitimacy. Local chieftains were not infrequently ready to convey away lands that did not belong to them; and where a colony grown powerful wished a pretext for usurpation, almost any Indian would do to make a treaty with or get a title from. It is scarcely necessary to say of negotiations thus conducted that they embraced no general scheme of Indian relations; that they aimed invariably at the accomplishment of immediate and more or less local objects, and often attained these at the cost of much embarrassment in the future, and even at the expense of neighboring settlements and colonies.

Throughout the history of colonial transactions, we find few traces of anything like impatience of the claims of the Indians to equality in negotiation and in intercourse. Neither the power nor the character of the aborigines was then despised as now. Strong in his native illusions, his warlike prestige unbroken, the Indian still retained all that natural dignity of bearing which has been found so impressive even in his decline. The early literature of the country testifies to the disposition of the people to hold the more romantic view of the Indian character, even where the animosities of race were deadliest; nor does it seem that the general sentiment of the colonies regarded the necessity of treating on equal terms with the great confederacies of that day, as in any degree more derogatory than the civilized powers of Europe in the same period esteemed the necessity of maintaining diplomatic relations with the great Cossack power of the North. Indeed, the treaty with the Delawares in 1778 actually contemplated the formation of a league of friendly tribes, under the hegemony of the Delawares, to constitute the fourteenth state of the Confederation then in arms against Great Britain, with a proportional representation in Congress. And this was proposed not by men accustomed to see negroes voting at the polls and even

sitting in the Senate of the United States, but by our conservative and somewhat aristocratic ancestors.

But after the establishment of our national independence, incidental to which had been the destruction of the warlike power of the "Six Nations," the nearest and most formidable of all the Confederacies known to colonial history, we note a louder tone taken, as was natural enough, with the aboriginal tribes, a greater readiness to act aggressively, and an increasing confidence in the competency of the white race to populate the whole of this continent. Earlier Indian Wars had been in a high sense a struggle for life on the part of the infant settlements, they had been engaged in reluctantly, after being postponed by every expedient and every artifice; but the conquest of the territory northwest of the Ohio appears to have been entered upon more from a statesmanlike comprehension of the wants of the united and expanding republic, than from the pressure of immediate danger. It was but natural that the concentration of the fighting power of the states, the consciousness of a common destiny, and the cession of the western territory to the general government, should create an impatience of Indian occupation which neither the separate colonies, nor the states struggling for independence, had felt. Yet even so, we do not find that, from 1783 to 1817, the United States did much more than meet the exigency most nearly and clearly at hand.

In the latter year, however, the negotiations for a removal of the Cherokees west of the Mississippi, although commenced under strong pressure from the much afflicted state of Georgia, and at the time without contemplation of an extension of the system to tribes less immediately in the path of settlement, mark the beginnings of a distinct Indian policy. In 1825, the scheme for the general deportation of the Indians then east of the Mississippi, was fairly inaugurated in the presidency of Mr. Monroe, Mr. Calhoun, his Secretary of War, proposing the details of the measure. In 1834, the policy thus inaugurated was completed by the passage of the Indian Intercourse Act, though large numbers still remained to be transported west.

The features of this policy were, first, the removal of the tribes beyond the limits of settlement; second, the assignment to them in perpetuity, under solemn treaty sanctions, of land sufficient to enable them to subsist by fishing and hunting, by stock-raising, or by agriculture, according to their habits and proclivities; third, their seclusion from the whites by stringent laws forbidding intercourse;

fourth, the government of the Indians through their own tribal organizations, and according to their own customs and laws.

This policy, the character and relations of the two races being taken into account, we must pronounce one of sound and far-reaching statesmanship, notwithstanding that an advance of population altogether unprecedented in history has already made much of it obsolete, and rendered necessary a general readjustment of its details.

The first event which impaired the integrity of the scheme of President Monroe, was the flight of the Mormons, under the pressure of social persecution, across the plains in 1847. The success of this people in treating with the Indians has often been noted, and has been made the occasion of many unjust reflections upon the United States, as if a popular government giving, both of necessity and of choice, the largest liberty to pioneer enterprise, could be reasonably expected to preserve peaceful relations with remote bands of savages, as effectively as a political and religious despotism keeping its membership compact and close in hand. But while the Mormons have certainly been successful in maintaining good terms with the natives of the plains, it is not so certain that their influence upon the Indians has been advantageous to the government, or to the white settlers not of the church. It clearly has been for their interest to attach the natives to themselves rather than to the government; it clearly has been in their power to direct a great many agencies to that end; and it will probably require more faith in Mormon virtue than the majority of us possess to keep alive much of a doubt that they have actually done so. We certainly have the opinion of many persons well informed that it has been the constant policy of the Latter Day Saints to teach the Indians to look to them rather than to the government as their benefactors and their protectors; to represent, as far as possible through agents and interpreters in their interest, the goods and supplies received from the United States, as derived from the bounty of the church; to stir up for special purposes or for general ends, troubles between the natives and the encroaching whites, east, west, and south; and finally so to alienate from the government, and attach to themselves the Utes, Shoshones and Bannocks, as to assure themselves of their aid in the not improbable event of a last desperate struggle for life with the power of the United States.

The next event historically which tended to the disruption of the policy of seclusion, was the discovery of gold upon the Pacific Slope, which in three years replaced the few insinuating priests and indolent

rancheros who had previously formed the white population of the coast, with a hundred thousand eager gold hunters. That the access of such a population, bold, adventurous, prompt to violence, reckless, and too often wantonly unjust and cruel, should stir up trouble and strife with the sixty thousand natives upon whom they pressed at every point in their eager search for the precious metals was a thing of course. The Oregon War followed, and occasional affairs like that at Ben Wright's Cave, leaving a heritage of hate from which such fruits as the recent Modoc War are not inaptly gathered.

In 1855–6 occurred the great movement, mainly under a political impulse, which carried population beyond the Missouri. In two or three years the tribes and bands which which were native to Kansas and Nebraska, as well as those which had been removed from states east of the Mississippi, were suffering the worst effects of white intrusion. Of the Free State party, not a few zealous members seemed disposed to compensate themselves for their benevolent efforts on behalf of the negro, by crowding the Indian to the wall; while the Slavery propagandists steadily maintained their consistency by impartially persecuting the members of both the inferior races.

Thus far we have shown how, instead of the natural boundary between the races which was contemplated in the establishment of the Indian policy of the government under President Monroe, two lines of settlement had, prior to 1860, been pushed against the Indians, one eastward from the Pacific, one westward from the Missouri, driving the natives in many cases from the soil guarantied to them by treaty, and otherwise leaving them at a hundred points in dangerous contact with a border population not apt to be nice in its sense of justice or slow to retaliate real or fancied injuries; while, during the same period, a colony of religious fanatics, foreign to the faith and very largely also to the blood of our people, was planted in the very heart of the Indian country, with passions strongly aroused against the government, and with interests opposed to the peace and security of the frontier.

But it was not until after the Civil War that the progress of events dealt its heaviest blow at the policy of Indian seclusion. In 1867–8 the great plow of industrial civilization drew its deep furrow across the continent, from the Missouri to the Pacific, as a sign of dissolution to the immemorial possessors of the soil. Already the Pacific Railroad has brought changes, which without it, might have been delayed for half a century. Not only has the line of settlement been made continuous from Omaha to Sacramento, so far as the

character of the soil will permit, but from a score of points upon the railroad, population has gone north and gone south, following up the courses of the streams and searching out every trace of gold upon the mountains, till recesses have been penetrated which five years ago were scarcely known to trappers and guides, and lodgment has been effected upon many even of the more remote reservations. The natural effects of this introduction by the railroad of white population into the Indian country have not yet been wholly wrought. There are still reservations where the seclusion of the Indians is practically maintained by the ill-repressed hostility of tribes; some, where the same result is secured by the barrenness or inacessibility of the regions in which they are situated; but it is evident that the lapse of another such five years will find every reservation between the Mississippi River and the Rocky Mountains surrounded, and to a degree penetrated, by prospectors and pioneers, miners, ranchmen or traders. Against the intrusion of these classes, in the numbers in which they are now appearing in the Indian country, the Intercourse Act of 1834 is wholly ineffective. It was an admirable weapon against the single intruder. It avails nothing against the lawless combinations of squatter territories.

While the movements of population have thus in great part destroyed, and threaten soon utterly to destroy, at once the seclusion in which it was hoped the native tribes might find opportunity for the development of their better qualities, and the natural resources to which, in the long interval that must precede the achievement of true industrial independence by a people taught through centuries of barbarous traditions to despise labor, the Indian might look for subsistence, Congress in 1871 struck the severest blow that remained to be given to the Indian policy, in its fourth great feature, that of the self-government of tribes according to their own laws and customs, by declaring that "Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the U. S. may contract by treaty."

In the face of 382 treaties with Indian tribes, ratified by the Senate as are treaties with foreign powers, this may perhaps be accepted as quite the most conspicuous illustration in history of the adage, circumstances alter cases.* Since Anthony Wayne received

* The doctrine of a *vanishing* Indian nationality was strongly insisted on by Mr. Justice McLean in his opinion in Worcester *vs.* The State of Georgia:

"If a tribe of Indians shall become so degraded or reduced in numbers as to lose the

the cession of pretty much the whole state of Ohio from the Wyandottes, Delawares and Shawnees, times have indeed changed, and it is fitting that we should change with them. The declaration of Congress is well enough on grounds of justice and national honor; but it none the less aims a deadly blow at the tribal autonomy which was made a vital part of the original scheme of Indian control. The declaration cited does not in terms deny the self-sufficiency of the tribe for the purposes of internal self-government, but the immediate necessary effect of it is further to weaken the already waning power of the chiefs, while Congress yet fails to furnish any substitute for their authority, either by providing for the organization of the tribes on more democratic principles, with direct responsibility to the government, or by arming the Indian Agents with magisterial powers adequate to the exigency.

Under the traditional policy of the United States, the Indian agent was a Minister Resident to a "domestic, dependent nation." The Act of March 3, 1871, destroys the nationality and leaves the agent in the anomalous position of finding no authority within the tribe to which he can address himself, yet having in himself no legal authority over the tribe or the members of it. It is true that, as matter-of-fact, agents, some in greater, and some in less degree, continue to exercise control, after a fashion, over the movements of tribes and bands. This is partly due to the force of habit, partly to superior intelligence, partly to the discretion which the agent exercises in the distribution of the government's bounty; but every year the control becomes less effectual, and agents and chiefs complain more and more that they cannot hold the young braves in check.

The above recital, however tedious, has been necessary in order to set fairly forth the actual condition of the scheme of seclusion, which is still, in profession and seeming, the policy of the government. It must be evident from the recital that the purposes of this policy are not being answered and that the increasing difficulties of the sit-

power of self government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper, need not now be considered, if indeed it be a judicial question. * * * But if a contingency shall occur which shall render the Indians who reside in a state incapable of self-government, either by moral degradation, or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend over them the ægis of its laws."—6 Peters, pp. 593–4.

If, as would appear, Mr. Justice McLean by this intends that a state may exercise such discretion, so long as the U. S. continue to recognize the tribal organization, however feeble or corrupt it may in fact be, the doctrine is flatly contradicted by that of the Supreme Court in the Kansas Indians.—5 Wallace, 737.

uation, in the wider and closer contact of the two races, will soon compel Congress to review the whole field of Indian affairs and establish relations, which, if they cannot, in the nature of things, be permanent, will at least have reference to the facts of the present, and the probabilities of the immediate future. Whenever Congress shall take up in earnest this question of the disposition to be made of the Indian tribes, its choice will clearly be between two antagonistic schemes, seclusion and citizenship. Either the government must place the Indians upon narrower reservations, proportioned to their requirements for subsistence by agriculture, and no longer by the chase; reservations which shall be located with the view of avoiding as much as possible the contact of the races, and working as little hindrance as may be to the otherwise free development of population; and, around these, put up the barriers of forty years ago, reënforced as the changed circumstances seem to require: or the government must prepare to receive the Indians into the body of the people, freely accepting, for them and for the general community, all the dangers and inconveniences of personal contact and legal equality. No middle ground is tenable. If substantial seclusion is not to be maintained, at any cost, by the sequestration of tribes and by the rigid prohibition of intercourse, it is worse than useless to keep up the forms of reservations and non-intercourse. Many tribes are already as fully subject to all the debasing influences of contact with the whites as they could be if dispersed among the body of citizens, while yet they are without any of the advantages popularly attributed to citizenship.

It requires no deep knowledge of human nature, and no very extensive review of Congressional legislation, to assure us that many and powerful interests will oppose themselves to a readjustment of the Indian tribes between the Missouri and the Pacific, under the policy of seclusion and non-intercourse. Railroad enterprises, mining enterprises and land enterprises of every name, will find any scheme that shall be seriously proposed to be quite the most objectionable of all that could be offered; every state, and every territory that aspires to become a state, will strive to keep the Indians as far as possible from its own borders; while powerful combinations of speculators will make their fight for the last acre of Indian lands with just as much rapacity as if they had not already, in Western phrase, "gobbled" a hundred thousand square miles of it.

In addition to the political, industrial and speculative interests which will thus oppose the restoration of the policy of Indian seclu-

sion from the shattered condition to which the events just recited have reduced it, three classes of persons may be counted on to lend their support to the plan of introducing the Indians who have thus far been treated as "the wards of the nation," directly into the body of our citizenship. We have, first, those who have become impatient of the demands made upon the time of Congress and the attention of the people in the name of the Indians, and who wish, once for all, to have done with them. Such impatience is neither unnatural nor wholly unreasonable. It must be confessed that no good work ever made heavier drafts upon the faith and patience of the philanthropic. What with the triviality of the Indian character, the absurd punctilio with which, in his lowest estate, he insists on embarrassing the most ordinary business, and his devotion to sentiments utterly repugnant to our social and industrial genius; what, again, with the endless variety of tribal relations and tribal claims, and the complexity of tribal interests, aggravated by jealousy and suspicion where no previous intercourse has existed, and by feuds and traditions of hatred where intercourse has existed, the conduct of Indian affairs, whether in legislation or in administration, is in no small degree perplexing and irritating. The Indian treaties prior to 1842 make up one entire volume of the General Statutes, while the treaties and Indian laws since that date would fill two volumes of equal size. It cannot be denied that this is taking a good deal of trouble for a very small and not very useful portion of the population of the country; and it is not to be wondered at that many citizens, and not a few Congressmen, are much disposed to cut the knot instead of untying it, and summarily dismiss the Indian as the subject of peculiar consideration, by enfranchising him, not for any good it may do to him, but for the relief of our legislation.

Next we have that large and increasing class of Americans, who, either from natural bias, or from the severe political shocks of the last twelve years, have accepted what we may call the politics of despair, by which is meant, not so much a belief in any definite ill-fortune for the republic, as a conviction that the United States are being borne on to an end not seen, by a current which it is impossible to resist; that it is futile longer to seek to interpose restraints upon the rate of this progress or to change its direction; that the nation has already gone far outside the traditional limits of safe political navigation, and is taking its course, for weal or woe, across an unknown sea, not unlike that little squadron which sailed out from the Straits of Saltez on the 3d of August, 1492. Many of the per-

sons now holding these views were formerly among the most conservative of our people; but emancipation, negro suffrage, and the consolidation of power consequent upon the war, have wholly unsettled their convictions, leaving them either hopeless of the republic, or, as temperament serves, eager to crowd on sail, and prove at once the worst and the best of fortune. In this despair of conservative methods, some of these men have acquired an oddly objective way of looking at their country, which to every man ought to be a part of himself, and have apparently as much of a curious as of a patriotic interest in watching the development of the new forms and forces of national life. Men of this class, and they are not few, are not likely to hesitate in extending to the Indians citizenship and the ballot. A little more or less, they think, can make no difference. After negro suffrage, anything.

Finally we have a class of persons, who, from no impatience of the subject, and from no indifference to the welfare of the aborigines, will oppose the policy of seclusion, as an anomaly not to be tolerated in our form of government. These are men who cannot bear that, from any assumed necessity or for any supposed advantage, exception should be made, of any class of inhabitants, or in respect to any portion of territory, to the rule of uniform rights and responsibilities, and of absolute freedom of movement, contract and intercourse, the whole nation and the whole land over. Were the Indians ten times as numerous, were their claims to consideration stronger by no matter how much, and were the importance to them of seclusion far more clear than it appears, these political philosophers would steadily oppose the scheme. They might regret the mischiefs which would result to the Indian from exposure to corrupting influences, they might be disposed to favor the most liberal allowances from the public treasury, in compensation to him for his lands, and for his industrial endowment; but they would none the less relentlessly insist that the red man should take his equal chance with white and black, with all the privileges and all the responsibilities of political manhood.

In view of the likelihood that the expediency of Indian citizenship will thus become at an early date a practical legislative question, it seems desirable in the connection to state the constitutional relations of the subject. The judicial decisions are somewhat confused although from the date (1831) of the decision of Chief Justice Marshall in the Cherokee Nation *vs.* the State of Georgia (5 Peters, 1) to that (1870) of the decision in The Cherokee Tobacco (11 Wallace,

616), there has been a marked progress (note especially the decision of Chief Justice Taney in the United States *vs.* Rogers, 4 Howard, 567) towards the stronger affirmation of the complete and sufficient sovereignty of the United States. Yet in December, 1870, the judiciary committee of the Senate, Carpenter presenting the Report, after an incomplete, and in some respects an inaccurate and inconsequential* recital of judicial opinions, made the following startling announcement:

"Inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations capable of making treaties, it is evident that an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States, would be unconstitutional and void."

That this is not good law need not be argued inasmuch as the decisions previously cited, in the U. S. *vs.* Rogers and in The Cherokee Tobacco, assert the complete sovereignty of the United States in strong terms;† in the latter, the doctrine being explicitly affirmed that not only does the capability of making a treaty with the United States, which has been held to reside in an Indian tribe, not exempt that tribe from the legislative power of Congress, but that not even a treaty made and ratified, among the stipulations of which is such an exemption, even were that exemption the consideration for cessions the benefit of which the United States has enjoyed and continues to enjoy, can hinder Congress from at any time extending its complete legislative control over the tribe. Con-

* We are aware that this is a heavy charge, but it is justified by the facts. The recital is incomplete. The decision in the United States *vs.* Rogers is not referred to. This case is, as it was treated by the Supreme Court in The Cherokee Tobacco, of the highest importance.

The recital is inaccurate. An opinion is given at length as that of Kent in Jackson *vs.* Goodell, 20 Johnson, 193. This is a case in the Supreme Court of New York, Chief Justice Spencer delivering the opinion, Kent having been previously appointed Chancellor. The expressions quoted by the Committee are to be found in Goodell *vs.* Jackson, in error to the Court of Appeals, 20 Johnson, 693. The recital is inconsequential, as will appear by what is said further in the text.

† "We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limit of one of the states, Congress may by law punish any offence committed there, whether the offender be a white man or an Indian."—Taney, Ch. J.

In The Cherokee Tobacco, the court quoting from Ch. J. Taney the sentence just preceding, and a similar utterance of Ch. J. Marshall, remarks, "Both these propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them, or to refer to further authorities in their support."

siderations of good faith may influence individual Congressmen in such a case, but the constitutional competence of Congress in the premises is declared to be beyond question.

Nor is the extraordinary proposition of the committee's report better in reason than in law. The argument is in effect this: The United States makes treaties with foreign nations; the United States cannot legislate for foreign nations. The United States may make treaties with Indian tribes; *ergo*, the United States cannot legislate for Indian tribes. This course of reasoning implies that the sole objection to the United States legislating for foreign nations is that it makes treaties with them: whereas there are several other good and sufficient objections thereto. It also implies that the sole consideration for the United States treating with Indian tribes, called by Chief Justice Marshall "domestic dependent nations," is that it cannot legislate for them, whereas the real consideration has been one of practical convenience, not of legislative competence.

We shall best set forth the constitutional relations of this subject by presenting the premises, whether of fact or of law, upon which all the judicial decisions relative thereto have been founded.

1. As matter of fact, the European powers engaged in the discovery and conquest of the New World, left with the Indian tribes the regulation of their own domestic concerns, while claiming the sovereignty of the soil occupied by them. The Indian tribes thus continued to act as separate political communities.*

2. The Constitution of the United States excludes from the basis of Congressional representation "Indians not taxed," without further defining the same.

3. The Congress of the United States has, with a few recent exceptions, treated Indians in tribal relations as without the municipal jurisdiction of the United States.

4. The Senate of the United States has confirmed nearly four hundred treaties, negotiated by the Executive under the general treaty-making powers conferred by the Constitution, with tribes which embrace about three-fifths of the present Indian population of the United States. The House of Representatives has, from the foundation of the government, as occasion required, originated bills

* Throughout the whole course of this discussion on the Constitutional relations of the Indians we should indicate as subject to possible exception the tribes found upon soil ceded by Mexico. It is claimed that as Mexico never treated the Indians within its jurisdiction other than as a peculiar class of citizens, all the members of those tribes became citizens of the United States by virtue of the provisions of the Treaty of Gaudalupe Hidalgo, 1848.

for the appropriation of moneys to carry out the provisions of such treaties.

This comprises all that is essential in this connection. The *indicia* gathered from particular acts of the government, or from the phraseology of individual treaties, really add nothing to the above.

We believe the following propositions to be consistent with the facts of history and with the latest judicial decisions.

1. The exclusion by the Constitution of "Indians not taxed" from the basis of representation was in no sense a guaranty to the Indian tribes of their political autonomy, but was a provision in the interest of an equitable apportionment of political power among the states, some states having many Indians within their limits, others few or none.

2. The self-government enjoyed by the Indian tribes under the Constitution of the United States, as under the European powers, has always been a government by sufferance, by toleration, by permission. The United States, for their own convenience, have allowed this self-government, because to reduce the savages to the condition of submitting to civilized laws would have involved a great expense of blood and treasure, while, through the tribal organization, a much better government, for the purposes of the civilized power if not for the welfare of the Indians themselves, could be obtained than through an administration which should disregard that organization. But this toleration of savage self-government worked no prejudice to the sovereignty of the United States.

3. The decay of a tribe in numbers and in cohesion, no matter to what extent carried, does not bring the members of such tribe within the municipal jurisdiction of the state wherein they are found, so long as the tribal organization continues to be recognized by the National Government. See The Kansas Indians, 5 Wallace, 737.

4. Congress is constitutionally competent to extend the laws of the United States at once over every Indian tribe within the territories, if not within the states of the Union, even though treaties may guaranty to individual tribes complete and perpetual political independence, the breach of faith involved in the latter case being matter for possible conscientious scruples on the part of legislators, not for judicial cognizance—see 11 Wallace, 616, 2 Curtis, 454, 1 Woolworth, 155.

We have thought it important thus to review the doctrine of the Report of the Senate Judiciary Committee, because from the high

standing of the Committee, from the assumption which the Report* makes of completeness in the citation of "treaties, laws and judicial decisions," pertinent to the subject on the express ground of a desire to enlighten not only Congress but the country in respect to our Indian relations, and from the wide circulation given to the Report, as compared with that obtained by an ordinary decision of the Circuit or Supreme Court of the United States, the Report has apparently come to be accepted by Congress and the country as an authoritative exposition of the history and law of the subject, although in the very month in which it was submitted to Congress the Supreme Court, in the Cherokee Tobacco, pronounced a doctrine which cuts up that of the Report, root and branch.

Such being the constitutional competence of Congress to deal with the Indians, without restraint either from the self-government hitherto permitted them, or from treaties to which the United States are a party, it is for Congress to decide, firstly, what the good faith of the nation requires, and secondly, what course will best accomplish the social and industrial elevation of the native tribes, with due consideration had for the interests of the present body of citizens.

How then stands the matter with the faith of the nation? By the Report on Indian Affairs for 1872, there appear (p. 16) to be in the neighborhood of 120,000 Indians with whom the United States have no treaty relations. These certainly can have no claims to exemption from direct control, whenever the United States shall see fit to extend its laws over them, either to incorporate them in the body of its citizenship, or to seclude them for their own good. There are, again, as nearly as we can determine by a comparison of treaties with the Reports of the Indian Office, about 125,000 Indians with whom the United States have treaties unexpired, but to whom no distinct guaranty or promise of autonomy has been made. Examination of these treaties reveals nothing which should prevent the United States from establishing a magistracy and a code of laws

* "Although the Committee have not regarded the questions proposed for their consideration by this resolution as at all difficult to answer, yet respect for the Senate which ordered the investigation, and the existence of some loose popular notions of modern date in regard to the power of the President and Senate to exercise the treaty-making power in dealing with the Indian tribes, have induced your Committee to examine the questions thus at length, and present extracts from treaties, laws and judicial decisions; and your Committee indulge the hope that a reference to these sources of information may tend to fix more clearly in the minds of Congress and the people, the true theory of our relations to these unfortunate tribes." Report, p. 11. It would perhaps have been fortunate had the Committee found the questions difficult.

for the government of these tribes, according to principles suited to their present condition, yet tending to raise them to a higher social and industrial condition. On the other hand, the perpetual interdiction of all white persons upon the reservations of these tribes, except "such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law," would seem to preclude the possibility of these regions ever being opened to settlement, and the Indians thereon resolved into the body of citizens on equal terms. But, as matter of fact, not even such treaty provisions need, with intelligent and firm but kindly management, greatly or long embarrass the government in the adjustment of the Indian question according to either principle which may be adopted, seclusion or citizenship. Few of these tribes but are obliged, even now, to seek from the United States, more aid than they are entitled to by treaty; while it is certain that in the near future, most if not all will be thrown in comparative helplessness upon our bounty. The United States being the sole party to which they can cede their lands (8 Wheaton, 543), and the sale of the great body of these lands being their only resource, the government will have the opportunity, not only without fraud or wrong to this people, but for their highest good and indeed for their salvation from the doom otherwise awaiting them, to cancel the whole of these ill-considered treaties, leaving the natives where they ought to be, subject to direct control by Congress. We repeat there need never be any difficulty in securing at the right time and in the right way, the relinquishment of lands or privileges from the Indians. They are unfortunately only too ready to sacrifice the future to present indulgence; while the government on its part can always afford to pay them far more for their lands than their lands are worth to them. Under this relation of the parties in interest, and with the pressure of actual want, due to the inability of the natives properly to cultivate what they possess, the United States may at an early date, with good faith and judicious management, easily secure the relinquishment of every franchise that stands in the way of a satisfactory adjustment of the difficulty.

There is still a third body of Indians, about 55,000 in number, occupying chiefly the regions known as the Indian territory, and representing the tribes which were the subjects of the colonization policy of President Monroe, to whom the United States have plighted their faith that no foreign authority shall ever be extended over them without their consent. These are not beggarly and

vagabond Indians, to whom the offer of subsistence would be sufficient to obtain the relinquishment of their franchises, or the cession of their lands. They are self-supporting, independent and even wealthy. Their cereal crops exceed those of all the Territories of the United States combined. In the number and value of horses and cattle, they are surpassed by the people of but one territory. In expenditures for education by the people of no territory.* If these people ever relinquish their autonomy, it will be because they desire the privileges of American citizens. This may well be, in the immediate future, and surely will be, sooner or later, unless they are made to fear the violence and greed of their white neighbors. Meanwhile, they should be honorably protected in the enjoyment of their treaty rights. They have already advanced so far in civilization as to secure their own future, as against anything but squatter and railroad rapacity; and their fate does not properly form a part of the Indian problem of the present day.

Excepting thus the present inhabitants of the so-called Indian Territory, who ought to be excepted from any scheme that embraces the half-civilized and the wholly savage tribes, we have practically a clear field for any policy which Congress shall determine to be best suited to the serious exigency of the situation, for, however easy to dismiss the subject for the time with ridicule, the task of so disposing a nomad population of 200,000–240,000, as to reduce to a minimum the obstruction it shall offer to the progress of settlement and of industry, without leaving the germs of lasting evil to a score of future states, and at the same time to secure the highest welfare of that population: this task is a most serious one, to which the best statesmanship of the nation may well address itself.

In characterizing the classes of persons who will naturally be found among the advocates of the policy of an immediate bestowal of citizenship upon the Indian tribes, whether they be willing or

* See Annual Report, Board of Indian Commissioners, 1872, p. 12.

Constant efforts are made to break the force of such comparisons as these, by asserting that the progress of the Indian territory in industry and the arts of life is due to white men incorporated with the Creeks, Cherokees, and Choctaws. If this be true, it would seem that white men when brought under Indian laws, and adopted into Indian families, exhibit qualities superior to those which they develop when controlling themselves and organizing their own forms of industry and of government. This suggests the inquiry whether it might not be well to turn over two or three territories that might be named, to the Indians, with liberty to pick out white men for adoption and for instruction, in the hope that these communities might in time be brought up to the condition of that of which the Indians have had sole control for forty years.

unwilling, whether for good or evil, we have in effect stated all the arguments in favor of that policy, for it is not probable that, aside from those who would properly be placed under one or another of the classes indicated, there are a score of persons reasonably well informed in Indian affairs, who would so much as affect to believe that such a course would have other than disastrous consequences to the natives.

The considerations which favor the policy of seclusion, with more or less of industrial constraint, are so direct and familiar, and are sustained by so general a concurrence of testimony and authority, that they will not require us greatly to protract this paper in their exposition and enforcement. These considerations are four in number, three of them having especial reference to the interests of the Indians, the fourth bearing on the welfare of the states to be formed out of the territory now roamed over by the native tribes.

First, so long as an Indian tribe is left to its own proper forces and dispositions, free from all foreign attraction, it is not only easily governed, but the whole body obeys the recognized law of the community with almost absolute unanimity. No expressions would be too strong to characterize the social homogeneity of an Indian tribe, and the complete domination of the accepted ideas of right and wrong, of honor and baseness. Public opinion is there conclusive upon every individual, and the spectacle, seen in every town and village with us, of large numbers openly practicing that which public opinion reprobates, or refusing to do that which public opinion prescribes, is wholly unknown. We do not say that this is the most desirable as the ultimate form of society; but this tyranny of sentiment may and should be made a most powerful auxiliary for good in the early stages of industrial and social progress for this people.

Second, it is unfortunately true that when the Indian is, by the powerful attraction of a race which his savage breast never fails to recognize as superior, released from the control of the public sentiment which he has been accustomed to obey, he submits himself by an almost irresistible tendency to the worst and not to the best influences of civilized society. While there are undeniably exceptions to this statement, it is supported by such a mass of melancholy evidence in the history of scores of tribes once renowned for all the native virtues, that no one has the right to advocate the introduction to such influences of uninstructed and unprovided tribes, unless he is prepared to contemplate the ruin of nine-tenths of the subjects of his policy.

Nor are they the worst elements of the Indian which thus submit themselves to the worst elements of the white community. The very men who bear themselves most loftily according to the native standards of virtue, are quite as likely to fall, under exposure to white contact, as are the weakest of the tribe. Their familiar attractions all broken, their immemorial traditions rudely dispelled, their natural leadership destroyed, the members of a wild tribe, strong and weak together, become the easy prey of the rascally influences of civilized society.

Third, the experiment of citizenship, except with the more advanced tribes, is at the serious risk, amounting almost to a certainty, of the immediate loss to the Indians of the whole of their scanty patrimony, through the improvident and wasteful alienation of the lands patented to them, the Indians being left thus without resource for the future, except in the bounty of the general government or in local charity. On this point a few facts will be more eloquent than many words.

The United States have, by recent treaties or legislative enactments, admitted to citizenship the following Indians. In Kansas, Kickapoos, 12; Delawares, 20; Wyandottes, 473; Pottawatomies, 1604: in Dakota, Sioux, 250: in Minnesota, Winnebagoes, 159: in Wisconsin, Stockbridges, to a number not yet officially ascertained: in Michigan, Ottawas and Chippewas, 6039: in the Indian Territory, Ottawas of Blanchard's Fork, 150. Time has not yet been given for the full development of the consequences of thus devolving responsibility upon these Indians; but we already have information, official or semi-official, to the effect that the majority of the Pottawatomie citizens, after selling their lands in Kansas, have gone to the Indian Territory and reassociated themselves as a tribe; that of the Wyandottes, considerable numbers have attached themselves to the reorganized tribe in the Indian Territory; that of the Citizen Ottawas of Blanchard's Fork, nearly all have disposed of their allotted lands, and are still cared for to some extent by the government as Indians; that of the Ottawas and Chippewas of Michigan, a majority certainly, and probably a large majority, have sold the lands patented to them in severalty, in many cases the negotiation preceding the issue of patents, two parties of white sharpers contesting for the favor of the agent, in the way of early information as to the precise lands assigned, and the disappointed faction, in at least one instance, resorting to burglary and larceny for the needed documents.

It will thus be seen that of these Indians upon whom the exper-

iment of citizenship has been tried, more than half, probably at least two-thirds, are now homeless, and must be reëndowed by the government, or they will sink to a condition of hopeless poverty and misery.

Fourth, the dissolution of the tribal bonds, and the dispersing of two hundred thousand Indians among the settlements will devolve upon the present and future states beyond the Missouri an almost intolerable burden of vagabondage, pauperism and crime. It is not even essential to the result of a dispersion of these tribes that the law should pronounce their dissolution as political communities. Unless the system of Reservations shall soon be recast, and the laws of non-intercourse thoroughly enforced, the next fifteen or twenty years will see the great majority of the Indians on the plains mixed up with white settlements, wandering in small camps from place to place, shifting sores upon the public body, the men resorting for a living to basket-making, beggary and hog-stealing, the women to fortune-telling, beggary and harlotry; while a remnant will seek to maintain a little longer in the mountains their savage independence, fleeing before the advance of settlement when they can, fighting in sullen despair when they must. It is doubtless true that some tribes could still remain together as social, even after being dissolved as legal, communities; but the fate we have indicated would certainly befall by far the greater part of the Indians of the plains, were the reservation system broken up, in their present social and industrial condition. To believe that a pioneer population of two, three or four millions, such as is likely to occupy this region within the next twenty years, can, in addition to its own proper elements of disorder, safely absorb such a mass of corruption, requires no small faith in the robust virtue of our people and in the saving efficacy of republican institutions.

This last consideration we have urged, not on behalf of the Indians, but in the interest of the present white communities beyond the Missouri, to whom such a dispersion of the tribes would be a far greater burden than the maintenance of the reservation system in its integrity could possibly be, and in the interest of a score of states of the Union yet to be formed out of that territory. Surely it is not in such cement that we wish to have the foundations of our future society laid.

We conclude, then, that Indian citizenship is to be regarded as an end and not as a means; that it is the goal to which each tribe should in turn be conducted, through a course of industrial instruction and constraint, maintained by the government with kindness

but also with firmness, under the shield of the reservation system. It is true that this system can no longer be kept up without sacrifice on our part. In the days of President Monroe, the sequestration of the Indians involved only the expense of transporting eighty or ninety thousand persons to a region not settled, nor then desired for settlement. To-day there is no portion of our territory where citizens of the United States are not preparing to make their homes. To cut off a reservation sufficient for the wants of this unfortunate people in their rude ways of life; to hedge it in with strict laws of non-intercourse, turning aside for the purpose railway and highway alike; and, upon the soil thus secluded, to work patiently out the problem of Indian civilization, is not to be deemed a light sacrifice to national honor and duty. Yet that the government and people of the United States cannot discharge their obligations to the aborigines without pains and care and expense, affords no reason for declining the task.

The claim of the Indian upon us is of no common character. The advance of railways and settlements is fast pushing him from his home, and, in the steady extinction of game, is cutting him off from the only means of subsistence of which he knows how to avail himself. He will soon be left homeless and helpless in the midst of civilization, upon the soil that once was his alone. The freedom of territorial and industrial expansion which is bringing imperial greatness to the nation, to the Indian brings wretchedness, destitution, beggary. Surely, there is obligation found in such considerations as these, to make good in some way to him the loss by which we so largely gain. Nor is this obligation one that can be discharged by lavish endowments, which it is of moral certainty he will squander; or by merely placing him in situations where he might prosper, had he the industrial aptitudes of the white man, acquired through centuries of laborious training. Savage as he is, by no fault of his own, and stripped at once of savage independence and savage competence by our act, for our advantage, we have made ourselves responsible before God and the world for his rescue from destruction and his elevation to social and industrial manhood, at whatever expense and at whatever inconvenience. The corner-stone of our Indian policy should be the recognition by government and by the people that we owe the Indian not endowments and lands only, but also forbearance, patience, care and instruction.

It is not unusual to sneer at the sentimentality of "the Quakers" and other active friends of this race. But we may as well remember

that posterity will grow much more sentimental over the fate of the Indian than any Quaker or philanthropist of to-day. The United States will be judged at the bar of history according to what they shall have done in two respects, by their disposition of negro slavery, and by their treatment of the Indians. In the one matter, the result is fortunately secure; nor will it be remembered against us, in diminution of our honor, that we procrastinated and sought to evade the issue, and for a time made terms and compromised with wrong. In that when at last we were brought face to face with the question we did the one thing that was right, and in tears and blood expiated our own and our fathers' errors, the ages to come will give us no grudging and stinted praise. Would that we were equally sure that no stain will rest upon our fame for what shall yet be done or left undone towards the original possessors of our soil! What is past cannot be recalled, nor has anything yet gone into history that need deeply dishonor us as a nation. Posterity will judge very leniently of all that has been done in heat of blood, in the struggle for life and for the possession of the soil by the early colonists; it will not greatly attribute blame that, in our industrial and territorial expansion and a conquest of savage nature more rapid than is recorded of any other people, savage man has suffered somewhat at our hands; it will not attempt nicely to apportion the mutual injuries of the frontier, to decide which was first and which was worst in wrong, red man or white; it will have ample consideration for the difficulties which the government has encountered in preserving the peace between the natives and the bold, rude pioneers of civilization. But if, when the Indians shall have been thrown helpless upon our mercy, surrounded and disarmed by the extension of settlement, and impoverished by the very causes which promote our wealth and greatness, we fail to make ample provision, out of our abundance, and to apply it in all patience and with all pains, to save alive these remnants of a once powerful people and reconcile them to civilization, there is much reason to fear that, however successfully we may excuse ourselves to ourselves by pleading the manifest destiny of the Anglo-Saxon race, impartial history will pronounce us recreant to a sacred duty.

FRANCIS A. WALKER.

ESSAY SEVEN.

THE CHINESE QUESTION IN THE UNITED STATES.

IN both the great political conventions recently held in the United States, what is called the Chinese or Mongolian, question was brought up and resolved upon. In neither was anything positive declared. In one it was resolved that Congress should inquire into the facts, and determine whether anything was necessary to be done;—in the other that the people of the Pacific coast should be protected against the Mongolians. No facts were affirmed; and no specific measures recommended. Negative and nerveless as these resolutions were, the attentive observer can not fail to see that two things very positive were implied;—first that the Chinese question had become one of great public interest, and next that the general government had a right to act upon it and if necessary to restrain Chinese immigration, or restrict its conduct. The last proposition has seemed to many persons, if not unconstitutional, at least inexpedient:—but these political conventions affirm the power of the general government over the subject, or they would not require Congress to act upon it. In this view, the question becomes open not only to discussion, but to inquiry as to the right or policy of measures restricting Chinese immigration, or restraining the immigrants here. In this inquiry, three questions at once arise.

1. Are the *facts* such as to justify any fear of consequences arising from this immigration?

2. Has the general government any right to prevent immigration?—or, is it solely within the province of the States?

3. If the general government has the right to restrict or modify immigration, is it expedient to exercise that power?

First, let us consider the facts of the case without which we can form no just opinion. The immigration of Chinese did not begin until 1853. Prior to that only a few individuals arrived, the total number being insignificant. When, however, the gold mines of California became productive, and the price of labor became high, speculation in labor, as well as that in the mines, became active and inventive.

Companies were formed for the importation of Chinese; and the Chinese laborers were brought into California subject to certain conditions, which made their state for a time that of semi-slavery. They worked cheap and worked well. The consequence was, that the Chinese migration increased, and in a few years assumed large proportions. This increase of numbers,—this cheap labor competing with American—the anti-American habits, and above all, the anti-christian religion of the Chinese, have created jealousy among the citizens of the Pacific States, with a certain fear that they might demoralize society and assume a controlling importance in the ultra Western States. This fear is not entertained on the Atlantic, but with the internal relations and connections of all the States, such an event, should it occur, would be of profound interest to the whole country. What then has been the Chinese immigration? The admirable Reports of the Bureau of Statistics (made by Mr. E. L. Young) give us the returns of immigration for half a century. We have not the whole series, but the following returns are sufficient for our purpose.

Chinese Immigration from 1851 to 1860 inclusive was	41,397
" " " 1861 to 1869 inclusive	56,146
Total number in 1870	15,741
" " Prior to 1871	113,284
" " in 1873	20,273
" " in 1875	16,430
" " in 1876	22,592

Taking its average of 1873 and 1875 as the unit, the Chinese who arrived in this country from 1876 to 1875 inclusive, were 91,750; and doubtless there were quite that number, if not more. The annual arrivals of Chinese from 1851 to 1860 inclusive were 4,139, from 1861 to 1869 inclusive 5,611. From 1870 to 1875 inclusive 18,350. We see, therefore, that Chinese immigration, instead of having diminished, has increased at a very rapid rate. The ten years from 1850 to 1860 gave 41,000; the ten years from 1860 to 1870 gave 56,000; but the ten years from 1870 to 1880 will give 180,000. To understand the effect of this properly, we must refer to the States in which they are localized. These States are California, Nevada and Oregon; which States had in 1870, less than 700,000 population. At the ratios in which they are increasing, they will have in 1880, an addition of 400,000 people, and of this number nearly half will be Chinese! Furthermore we observe that the total immigration

into the United States in 1875 was less than half what it had been three years previous, while that of the Chinese was trebled. In fact, then, it amounts to this,—that the immigration of the Chinese is, in proportion to British and Germans, six-fold what it was three years ago: and that in the three Pacific States it is equal to other immigration added to the natural increase of population. The inference from these facts is inevitable, that this Chinese immigration is, if continued, likely to affect the whole United States, and to the Pacific States is vitally important. Then the question arises, is it likely to continue if unrestricted by law?

There are certain laws of human nature which have been historically exhibited in every age of the world and from which we have no indication of any departure. Man is a migrant;—not because he could not be satisfied with a perfect state; but because being imperfect, he seeks a better condition. To seek a better condition has been the one motive which has induced every emigration upon earth; from the hungry hordes which descended upon the Roman empire, to the Irish and Germans who come to this country. It is the instinct of human nature, and the most home-bound Switzer, who ever wept at the songs of his native land, leaves that land to come here. Will this motive be less powerful in the Asiatic? The wages of a Chinaman in his own country is scarcely a tenth in our currency of what it is in the Pacific States. Of course the food necessary for life is also very much cheaper in China. When, however, we make full allowance for this fact, it must be that the condition of a Chinese laborer in America is incomparably better than it can be in China. The knowledge of this better condition soon spreads in China; and the migration to America which was at first induced by companies formed for that purpose, is evidently becoming voluntary. When we remember that population in some provinces of China exceeds 400 per square mile; and that in Belgium, the very garden of Europe, it is not more than 300; and in the State of Ohio, it is only 70—we can understand why a Chinaman,—with wages at the very lowest point, and with the pressure for food constantly upon him—would be willing to migrate to a land of high wages and abundant food, even when climate, religion, and fatherland all urge him to remain. The Chinese Asiatic, although he may at first be slow to adopt this last remedy for human evil—will scarcely violate the instincts of human nature, or reverse historical precedents. If he be driven to the last refuge of humanity, he will seek a better condition, as every people pressing against the limits of subsistence have done. from Huns and

Goths, to Irish and Germans; at least the statistics before us point to that conclusion. In regard, therefore, to the fact of increasing numbers, and especially in its great proportion to the population of the Pacific States, there is reason for some fear; a fear, which has for many years been felt in regard to some classes of people coming from Europe. In their case, however, the fear was alleviated, and has in a degree proved groundless, because they were professed Christians, to a great degree of our own race, and of the same order of civilization. Doubtless this is the reason (the similitude of conditions) which prevented any limitation or restriction on European immigration. In the case of the Chinese, however, there is no such similitude. They are neither of our religion, our race, nor our civilization. It is impossible to conceive of any portions of the human race more opposite to each other in their elementary character, than the Anglo-American and the Mongolian Chinese. Here comes in another fear, and the one which most affects the people of the Pacific, and the political conventions to which they appeal. It is the fear of the demoralization arising from a people of their different habits, methods, and examples. It is not the fear that they can propagate their religion, or that they can be of political importance; but it is the fear of the demoralization which arises interfering with the pursuits of Americans, with the introduction of morals and manners which present new forms of evil,—examples of vice which have had no parallel here, and of Paganism tolerated, and uninterrupted in a Christian country. In one word, it is the demoralization, which must necessarily attend an anti-American and anti-Christian system set up in our midst. In reply to this fear of anticipated evil, it is said by some who are well acquainted with the Chinese; first, that it is the lowest and worst of this people who have come, and should a large immigration follow, they would be of a better class; and again, that these very Chinese have some virtues —virtues highly valued by Americans. It is said they are thrifty, industrious, good servants, and obedient. This may be true, as it is true of some Americans and Europeans, and there may yet be a great amount of the lowest vice and ignorance. A traveler who has been in nearly every country on the globe, told us that he had never seen a people whom he disliked as much as the Chinese, on account of their low vices and their degraded character. He may have been prejudiced; but the account given of the Chinese, by the citizens of California, corresponds with that given by him. At any rate we must remember that virtue and intelligence are the essential founda-

tions of republican government, and all the legislation of our country in regard to education and morals, has been directed towards strengthening these foundations. In the vast European migration to this country, there have been thousands who were as full of vice and irreligion, as these Chinese. But these thousands came individually, very few compared with the whole number, and set off against them were tens of thousands of the virtuous and intelligent. They were not embodied masses of the ignorant, vicious, and Pagan. If the great body of Irish who have migrated to this country, had been Pagans, totally ignorant of all our institutions, sympathizing with nothing they found here, and sending back their very bodies to be buried in the cemeteries of Ireland; does any one believe that millions would have been suffered to come? We are not arguing this question; but presenting the clearly expressed fears of those among whom these people live.

A pamphlet has recently been issued by L. T. Townshend, D.D., which gives the other side—the one favorable to the Chinese in California. But does he give us any new facts? Not at all. He says:

"We likewise admit, looking upon the condition of the Chinese at their arrival, unimproved by our civilization, education, and Christianity, that they are far from being the most desirable companions. As they touch these shores, they are, as a race, cool and cynical, corrupt and corrupting heathen. More than once we have started back from that sort of deceptive physiognomy whose smile, with its set teeth and parted lips, seemed to go through us like a blade of steel.

"But on the other hand, we are led to reason thus: if they are human beings, they can be Christianized; and when they are Christianized, they will become valuable and desirable citizens in any State or country. Hence the most vital thought connected with this Chinese question is the one which relates to their conversion to the Protestant Christian faith."

After saying this, he likens them[1] to the Irish Catholics, or the German Infidels, and rather prefers the Chinese to either. We do not. He admits them to be "corrupt and corrupting heathen,"—and is that not the definition of the worst people? But the learned doctor forgets that he is not discussing the real question. The question is a practical, and an immediate one. It is whether we shall allow a race, utterly foreign to our own; with a religion utterly opposed to our own; interfering directly with the wages and benefits of the American laborer,—"corrupt and corrupting,"—to come into our Pacific States, and fill them up with Asiatic hordes? That

[1] Page 60.

is the practical question,—whatever theories may be formed upon it. The statistics we have given, and the admitted facts concerning the Chinese character, prove that there is some ground for fear from this Chinese immigration. Then come the other questions.

2. Has the general government any constitutional right to prevent immigration? Or, have the States that right?

The conventions of the great political parties, to which we have referred, admitted the full right of the general government over this subject, when they referred it to Congress for inquiry, or legislation. The constitution of the United States contains no provision either admitting or prohibiting immigration of any kind. It was taken for granted that there would be immigration, and at the time the constitution was formed, immigration was desirable, and looked to as one of the means of strengthening and enlarging the country; and while the immigrants were a similar people, of a similar religion, no objection was made to their increasing numbers. The constitution has only two provisions which at all touch the immigration of foreigners; the first (1st article, 8th section, 4th clause)—that they be naturalized; and the second, (4th article, section 3d, clause 1st)—that new States may be admitted, no matter of what people they were composed. The effect of the first of these provisions was to make —under general laws which were immediately enacted for that purpose—all immigrants to this country, who, as the law provided, might remain for five years, naturalized "citizens" of the United States. The effect of the second provision was to make a new State in the Union, although the inhabitants of that state might be all immigrants from foreign countries; or all of a different race and religion. Nothing like this was ever adopted among all the nations of the world. If this be admitted, as a principle *without exception*, then it follows, that we have no country; for the very essence of a "country," is that it is a land in which we have something *exclusively* our own. If all the world can come to the United States,—be made citizens,—and inherit the land which we claim, then we have no country; that is, we have no country in which we have anything exclusive. In "Mansfield's Political Grammar," published more than forty years ago, this question was anticipated with these remarks:

"The *principle* is simply this, that a colony settled upon an adjacent territory, and within the jurisdiction of the United States, whether it be composed of citizens of the Union or emigrants from foreign nations, Europeans, or Asiatics, shall, on enumerating a specific population, be admitted to equal rights with the original States.

This principle is likewise unlimited in respect to the number, distance, or settlement of the colonies. The consequence is that the original States may ultimately, or they soon must, be left in a minority as to power in that government which they founded and of which they were the sole possessors. They make the whole world partners with themselves, in an inheritance of liberty, and power, and wealth. The grant thus made to the world of an asylum for all mankind, is noble and benevolent, and the more so, as it seems to have had no former example among nations. It may be said, that the States thus added are not *foreign*;—it is true they were not *conquered*, but they are just as subversive of the powers of the old States as if they had been taken from foreign countries."

This passage was alike descriptive and prophetic. The "original states" have been "left in a minority," with the strong probability, that in a few years they will make but a small part of the American Union. States have been admitted without any reference to "number, distance, or settlement." Louisiana was admitted, when its inhabitants were almost wholly French or Spanish. Florida was admitted from Spain; Texas and California from Mexico. All this was undoubtedly noble and generous; but these immigrants belonged to the Christian nations of the earth. They belonged to the Caucasian race. There was nothing antagonistic in their blood, habits or religion to the people who formed America. But now we have a new question. Shall Paganism come to form new States in America? Shall the Mongolian, who is nothing more than the semi-civilized type of our North American Indian, come here to share in the empire which his barbarous cousin has lost? In that case, human history will never have presented a more remarkable scene than that in which the last Indian perishes from this continent, while his Mongolian kindred quietly comes in to share the country of his conquerors! But we close this branch of the inquiry by saying that the sole and exclusive power in this matter belongs to the National Government, and that the political conventions were right when they noticed this subject, as of great public interest, and referred it to the inquiry and legislation of Congress.

3. We come now to the third question. If the general government has the right to restrict or modify immigration, is it expedient to exercise that power?

In general terms,—we answer that it is.

Of course we do not mean, that the universal practice of our country should be reversed. All practical legislation ought to de-

pend upon the particular circumstances of the case. It is impossible to apply abstract rules to the legislation of any country. It is quite possible that it was expedient to admit universal immigration up to 1875, and yet not expedient after that. It depends upon what is practically for the interest of this country, socially, morally and politically, whether we shall admit Turk and Pagan to sit at our table, and share our inheritance. The question of expediency in reference to Chinese immigration does not depend upon any established political principle; for our constitution has established no principle upon the subject. We are on the same ground, as to emigrants coming into the country, that England or France is. We can put what restriction upon it we please. The question of expediency then comes back to where we began;—do the facts give such reasons for fear of danger from Chinese immigration, as to justify interference? We have given these facts, and every reader can judge for himself. There are at present three States and one territory on the Pacific coast. In 1860 they contained 450,000 people; and in 1870 715,000. The whole increase of ten years was 265,000, or 59 per cent. Of this increase 60,000 were Chinese. There is no reason to suppose from recent statistics, that increase of population on the Pacific coast has been in a greater ratio since 1870, than it was before. In the six years since the census was taken the increase of the Pacific States would, then, be 253,100, of which 100,000 in round numbers are Chinese. In the next four years, bringing results to 1880, there will be an increase of 168,000, of which, at the present rate of Chinese immigration, 88,000 will be Chinese. In other words,—in 1880, the increase of Chinese in the Pacific States, *will exceed that of Americans and all other races put together*. It is exactly a similar case with that of the importation and increase of negroes in the extreme Southern States. They increased until three or four of those States have a majority of negroes, and the question of their condition enters into all the religious and political discussions of the day. Is it worth while for us to go through exactly the same experiences and raise questions and antagonisms which will agitate the country in the next generation?

There is connected with this subject a religious problem, which Dr. Townshend solves by saying that the vital question is to convert the Chinese, and make them desirable citizens. All Christians will assent to this; but does it follow that the Mongolian must be brought to America to be converted? That is the question. The whole policy of the Bible is opposed to this idea. The word had to be preached first at Jerusalem, because there were the ancient people

of God. Then the apostles and disciples were sent forth with the command, "Go ye into all the world, and preach the gospel to every creature." The whole policy of the Bible is aggressive. From the bondage of Egypt to the days of the apostles, and from the apostles to the missionaries of America, the whole language and policy of the Bible is GO; preach the Word to the nations and subdue the earth. We are not to convert other nations by inviting them to come here. We are to go to them, as we are doing from the Ganges to the Himalayas, and from Japan to China. The argument that the Chinese are to be converted here, is precisely that of the slaveholders, when they claimed that bringing Pagan Africans to America to become Christians here, was one of the great blessings of slavery!

The political conventions have referred this subject to Congress for inquiry and legislation. There we may leave it. But one or two suggestions may not be out of place. First, this discussion revives the question whether this is a Christian country? We all assume it to be. All our legislation, from the constitution down through the laws of the respective States, have assumed, directly or by implication, that this is a Christian country. It is so in fact, and no one doubts it. Have we, then, no right to say that idol gods shall not be worshiped in idol temples? Then ought we not, as a Christian people, to legislate upon this subject?

Again, we have assumed the right, not only to prohibit slavery, but to destroy slave property. We have also a perfect right, and it is not only a right, but a duty, to prohibit the semi-slavery, which exists in what is called the Coolie trade. The Chinese have nearly all been brought to this country by commercial companies, who pay their expenses under a contract to labor so long, their wages to go to the contractors. This is for a time semi-slavery. It has the evil effect of bringing thousands to this country, who would not otherwise have come. The suppression of this practice is absolutely necessary, if any restraint whatever is to be put on Chinese immigration. If individuals and families are left to come by their own voluntary action, the immigration will probably be much reduced and be of a better character.

At the rate the Chinese are now coming they will number millions in another generation. There is nothing—not even their conversion to Christianity—that can make them homogeneous with our present people. They will live among us a separate race; and there will arise all the troubles and problems which now arise out of the negro condition, unless their immigration can be restricted by proper legislation.

EDWARD D. MANSFIELD.

ESSAY EIGHT.

THE GUARANTEE OF ORDER AND REPUBLICAN GOVERNMENT IN THE STATES.

A SHORT time ago, the whole country was plunged into a condition of anxiety and excitement by the conflicting claims to the executive authority in one of the States, and by the preparations made, and measures set on foot, to support them. With nothing preceding it to prepare the public for such an event, the announcement came by telegraph that a judgment had been entered up in one of the inferior courts of the State, declaring the person who for a year and more had acted as Governor, under claim of election and with full recognition of his lawful right by the other departments of government, had never been elected in fact, but was a usurper and must be ousted, and the person who was his opponent in the election installed in the office. The circumstances attending the decision all indicated that it was not made in the expectation that the usual deference which judicial decisions are entitled to and are expected to receive, would be paid to it, but that it was well understood to be extraordinary, and was intended as the first step in an organized and forcible revolution in the State government. Secret preparations for such a revolution had already been made, and there was immediate attempt to render them effectual by seizing the public offices and public records, and placing armed men in possession of the State House. The resistance of the acting governor brought hostile military forces face to face at the State Capitol, and for four weeks and more, preparations for a conflict of force were carried on throughout the State, with all the evidences of a purpose to submit to the arbitrament of war a question which, under the American system of government, is supposed to depend exclusively upon a counting of ballots. While thus the hostile parties stood in threatening attitude, the eyes of the whole country, as by common consent, were turned to a single person at Washington, who was supposed to possess the power, not only to prevent a hostile collision but also to put an end to the whole controversy by his declaration of an intention to sup-

port one of the two parties to the dispute. The organs of public sentiment appealed to the President to interpose, and the public, who were scandalized by the whole proceeding, which they justly regarded as a reproach to American institutions, awaited his action with anxiety and impatience. Even the rival claimants sent appeals to Washington, and at last appeared there by counsel, each seeking to convince the President of the justice of his claims, but each at the same time assuming that whatever decision should be made must necessarily determine the controversy. The President gave his decision at last, and the party against whom it was made at once disbanded his forces, and relinquished his attempt upon the office; the more prominent officials who took sides with him, resigned or were removed; some were even arrested for treason, but in a few days quiet was restored, and the evidences of disturbance had passed away.

And this determination of a threatening and dangerous conflict, which involved the whole political authority of a State, was effected by a word from an officer at a distance; an officer too, not occupying any position in the State government, not vested with judicial authority to receive evidence and determine questions of fact, and who, though by law he had no voice whatever, as elector or otherwise, in making the choice for governor of the State in question, was nevertheless enabled by the force of circumstances and by the moral power of his position in the Federal Government, to settle for the people of the State what person should have the administration of their affairs as chief executive.

Perhaps the main significance of this transaction consists in the fact that the interference of the President was generally recognized as both necessary and legitimate, and that wherever his action was criticised by persons not involved in the contest, it was not because he brought the power of his position as federal executive to the determination of a dispute pertaining exclusively to the administration of State government, but because he was so tardy in interfering, and left the dispute open so long. There was no claim that he had usurped any authority or violated any law. The inference seems irresistible that in the opinion of the public it is legitimate for the President under some circumstances to take conclusive action in the settlement of questions of State government, and to determine by his fiat who shall and who shall not administer its affairs. If this occurrence stood alone, it would be less significant; but, within a brief period it was preceded by several others, in which the authority

of the government at Washington, or of some one or more of its departments, was employed in giving direction to, and in some cases in controlling, the internal affairs of States. The present would therefore seem to be a fitting occasion for some examination of these occurrences, in order that we may see how far they are justified by the rules of law, and by the principles upon which our government has been organized.

It will not be disputed by any one that the States, when they assented to the Federal Constitution, contemplated interference in their internal affairs only in extraordinary emergencies which were particularly specified. All propositions to give to the General Government, or to any one of its departments, a negative upon State laws, were received with little favor in the constitutional convention, and the suggestion that the governors of the States should be appointed by the federal executive with still less. The prevailing opinion was —perhaps we may say the general opinion—that Federal and State governments ought respectively to be sovereign within their allotted spheres of constitutional action, and that one of the chief purposes to be kept in view in forming a constitution, should be to fix and define the limits of their respective powers, and to establish securities against conflict and confusion in their exercise. It may safely be assumed that such a thing as the setting up or putting down of a State government, or the putting in or out of a State executive, by the mandate or authority of the President or of Congress, was never contemplated as among possible events under the Constitution which the convention agreed upon and the States ratified. Still less did it occur to any one that the time might ever come when, in consequence of extraordinary events, the General Congress would deem itself impelled to assert and exercise the right to a supervision of State constitutions and laws, so long as they were of the general character of those which with public approbation were originally adopted, or that it might compel their amendment in order to bring them more completely into harmony with the sentiments of the Congress itself.

The possibility, however, that Federal interference in State affairs might under some circumstances become a necessity to the Union, was not only foreseen, but the propriety of making provision for it was generally conceded. The Union of the States was founded upon unity of race and language, and similarity of institutions, and upon the necessity of combined strength and resources, in order that the institutions might be preserved and perpetuated. But the similarity of institutions might at any time be destroyed by a revolution in govern-

ment in one or more of the States, accomplished either by the force and violence of a faction, or as the peaceful result of a change in the political sentiments of the people; and however improbable such an event might have been thought, the experience of the world did not justify the convention in assuming that it ought not to be considered among the possibilities against which prudence would demand securities. Whether such a revolution should be effected by the action of the majority of the people proceeding under the forms of an election, or by a forcible displacement of the existing government, would not be so material as the fact, that by means of it incongruous institutions would be brought into the Union with an inevitable tendency to its disruption. It was consequently in the exercise of wise statesmanship in providing securities for the Union that the convention made provision in the Constitution that

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive when the legislature can not be convened, against domestic violence."

It is interesting after this lapse of time to consider how little the framers of the Constitution, and the very able and astute statesmen who by their writings and speeches commended it to the favor of the people, anticipated the importance which future events might give to some of its provisions, or the practical construction that, in their application to subsequent occurrences, might be put upon them. We have no evidence, for instance, that any one at that time anticipated that the provision agreed upon to preclude the repudiation of debts could contain within itself such obstacles to State legislation in various directions as have since been discovered; or that the requirement of a guarantee of republican government might one day be relied upon by able and earnest statesmen, as the authority under which governments whose features were unquestionably republican, and some of which had existed with little change from the time the Constitution was formed, might be put aside as not being republican in fact. The provision precluding the States from passing any laws violating the obligation of contracts was passed over with a bare mention by the writers of the "Federalist," and the guarantee of republican government received little more notice in their discussions. The provision extends, says Mr. Madison in No. 43,

"No farther than to a guarantee of a republican form of government, which supposes a pre-existing form of government of the form which is to be guaranteed. As

long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms they have a right to do so, and to claim the Federal guarantee for the latter. The only restriction imposed on them is, that they shall not change republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered a grievance."

And the few remarks he adds to prove how idle would be any fear that such a requirement could ever be dangerous to the States, or be made the pretext for unconstitutional interference, we have no reason to doubt were satisfactory to the general public of that day. The controversial papers of the time certainly disclose no evidences to the contrary.

"A republican form of government," however, is not capable of being made by the definition to stand so clearly and distinctly apart from all others as to preclude the possibility of cavil concerning the authority and obligation of the Federal government to guarantee to a State any particular government which may have been set up or been proposed. The differences in those which have been known in history have been very great, not only in form, but also in the rights and privileges they secured to the people, and those which, for the purposes of government, they required the people to surrender. And in the case of a mixed government, in which the power of the crown has become nominal, and the sovereignty is exercised by representatives of the people as it now is in Great Britain, the term republican is not inaptly or unjustly applied. Such mixed governments, however, we may safely assume, are excluded by a proper interpretation of the constitutional provision. No doubt can exist that the people of the United States, to whom the name of king was then specially obnoxious, adopted the constitution with the understanding that no government with a hereditary executive could be received or could remain within the family of States. The king, to their apprehension, was the representative of the oppressor whose yoke they had rejected, and by a republic they understood a government in which a king would have no part, and the chief ruler would be chosen directly or indirectly by the people by virtue of their inherent right to govern themselves. And the phrase they employed—a republican *form* of government—has peculiar significance, and may well incline us to believe that the form was had in view quite as much as the substance. The guarantee was clearly intended, as Mr. Madison understood it, to be of the governments then existing, and of such similar ones as might by Con-

gress be received into the Union subsequently, modified as they might be from time to time by the people of the States respectively.*

The people! There is no word which plays a larger part in the catch phrases of politics, and none which is employed in a sense more vague and indefinite. We all believe in the right of the people to rule. As Mr. Choate has said, "It is certain that in the American theory, the free theory of government, it is the right of the people at any moment of its representation in the State legislature to make all laws, and by its representatives in convention, to make the Constitution anew. It is their right to do so peaceably, and according to existing forms, and by revolution against all forms." But while one "people" would act under the forms, it would be almost certain to be another "people" who would act against the forms. It is never all the citizens, or even the major portion of them, who participate in establishing and maintaining representative government. Under the most liberal constitution ever made, a comparatively small number, perhaps one-fourth of all, are permitted a voice in the government, and act by representatives in the making of laws. If we examine the constitutions existing when the Federal Government was organized, we find under some the proportion was much smaller, and we discover restrictions upon suffrage, such as the popular voice at the present day would unhesitatingly pronounce unreasonable and unjust. But the Federal Constitution was not supposed capable of correcting all injustice and inequality in the States; it was not framed with a purpose or looking to a mission so comprehensive; it must take cognizance of things as they were, and doing so it must recognize those found in possession of political privileges and wielding the political authority of a State under its constitution as in the aggregate making up the political corporate entity, *the State*, and known to constitutional law as THE PEOPLE. And whatever the abstract theory of right to proceed "by revolution against all forms," the Federal Constitution contemplates no revolution in State governments. It may be assumed to have contemplated changes in constitution and laws, in accordance with constitutional forms, but it supposed these would prove ample to meet the reasonable demands of reform, and it

* Mr. John Adams and Mr. Jefferson have both remarked upon the vagueness of the word *republic*. "As it is used," says the former, "it may signify any thing, every thing, or nothing." "The government of Great Britain, and that of Poland, are as strictly republics as that of Rhode Island or Connecticut, under their old charters." Works, vol. x., p. 378. Compare the views of Jefferson, Works, vi., 605. Probably the two would not have disagreed as to the sense in which the term republican government in the Constitution was to be understood.

endeavored to make most effectual provision against changes which might be attempted outside those forms, and by the employment of force. *The people* who were excluded from participation in State government were expected to find at the hands of those who wielded the political authority, the proper attention to all just complaints.

How far such an expectation would be justified by the event, was to be determined in the case of Rhode Island. The facts of that case are so well understood that only very brief reference need be made to them here. For more than half a century after the Federal Constitution was established, the people had neglected to form a State constitution, and the government had been administered under the colonial charter granted by Charles II. In other words, that charter had been accepted as a sufficient and satisfactory constitution, and it might perhaps have continued to be such until the present day, but for an unequal apportionment of representatives, and for its restrictions upon suffrage, which confined the privilege to less than one half the adult white male resident citizens. Attempts to substitute a more liberal and just constitution failed to receive the approval of the legislature, and the dissatisfied classes at last appealing to that first and highest of the fundamental principles of our democratic republican governments, that the people are sovereign, summoned a convention of representatives of the people for the exercise of this sovereignty, and by this convention a constitution was framed and submitted to a popular vote for adoption.

This constitution, however, like the old charter, allowed only certain classes of citizens a voice in the government. Moreover, these classes were selected by arbitrary standards which did not necessarily determine their fitness for the elective franchise, and might perhaps exclude others of equal or greater fitness. Voters must be males, they must have reached a certain age, and they must have certain qualifications of birth or naturalization and residence. Persons possessing these qualifications were not only to take the reins of authority into their hands for their own government, but as the proper representatives of the whole society, they were to govern the whole. This was what was proposed, and this was what was attempted to be carried out by means of an election of State officers after the proposed constitution had been voted upon and declared adopted.

The case then was this: One class of persons, selected by certain arbitrary standards under the charter, possessed and were exercising the powers of government, and another class selected by other arbi-

trary standards proposed to take possession of them. As the first class had possessed these powers for many years, under a charter of government which had been acquiesced in by all others, and under which they had preserved order and exercised the highest rights of State sovereignty, they had at least this acquiescence as evidence of their right, and would be justly entitled to rely upon it until better evidence should be adduced of the right of others. The better evidence of the right of the revolutionary party could only be this: that their constitution was more liberal and just in the matter of representation and suffrage. If there were principles of natural right which were generally accepted, and to which obedience would consequently be rendered as of course, by means of which the difficult questions of suffrage might be judged and determined, the pretensions which were put forward in the Rhode Island case ought to have been tested by them. But it is only in the vague talk of theorists and demagogues that we find any such principles asserted. If nature determines any thing on the subject, it is only that, from physical and mental immaturity and imperfections, it is impossible that certain classes should take part in the affairs of state. Beyond that it does not go; and between those who may and those who may not have a voice in the government, the line of distinction must be determined by human reason, acting in the light of experience, and prescribing a rule by positive law. And the positive law once prescribed must be respected and obeyed until it is set aside by the authority that prescribed it, or there can be no settled government. If the mere circumstance that the old constitution is less liberal than the new, subjects the former to be set aside of right, then it is manifest that no constitution can be of binding obligation, so long as a more liberal one is possible, but any that shall be established may be overturned at the option of dissatisfied classes who shall see fit to frame a new one with a broader basis of suffrage, and assert their right to put it in force. The constitution of to-day, under which adult males only may vote, would be overthrown the moment women should demand the ballot, and the constitution of their framing in turn must give way to any broader charter of government which should reduce the requirement of age, or dispense with that of naturalization or residence. To recognize such a doctrine would be to enact anarchy as a constitutional principle. And it is worthy of note, that the very case which was presented in Rhode Island, was one which had been anticipated by Mr. Madison, as likely to happen, and in which it might become the duty of the United States to interfere in support of the State gov-

ernment against domestic violence. "May it not happen," he says in the "Federalist," "that the minority of *citizens* [electors] may become a majority of *persons* by the accession of alien residents, of a casual concourse of adventurers, *or of those whom the constitution of the State has not admitted to the right of suffrage?*" It was under precisely these circumstances that the President was called upon to sustain in Rhode Island the authorities under the charter constitution—a constitution which, whatever it might have been three quarters of a century before, had now, as regards some of its chief features, ceased to be just or reasonable, and perhaps also had ceased to be one under which the government could be longer administered to the general content of the people.

It is unnecessary to recall the details of this controversy; it is sufficient to say that there were soon two sets of persons claiming to be the legal officers of the State, and proposing to make good their claims, if need be, by force of arms. The probability of domestic violence was imminent, and the duty of the United States to aid in suppressing it, on the proper demand being made, was clear. But no intervention by the United States could take place without a recognition of one of the opposing parties as the representative of lawful authority. It was only at unlawful violence that the provision in the Constitution was directed, and that violence could not be unlawful which should consist solely in the support of the duly constituted government against parties who proposed to subvert it. Moreover, by the terms of the Federal Constitution, there must be a demand for assistance from the State legislature or executive, before it could be rendered, and to respond to a demand was to recognize the body or the person making it as being in possession of the lawful authority. To the popular apprehension, therefore, the duty of the President to interpose in the suppression of domestic violence would seem to be complicated by the necessity of first determining such legal and constitutional questions as the right to the possession of lawful State authority might depend upon; and as whatever conclusion he might reach would be carried out with military force, the question might well be made whether it had been intended by the Constitution to clothe the President with a power in its consequences so essentially judicial, with respect to legal and constitutional questions of the gravest import, involving the highest rights of citizens, possibly the very existence of State government; and also with the authority to execute his own judgments in a manner and with a force which could leave to an aggrieved party no opportunity for redress. In a gov-

ernment by the people, with constitutional checks and balances, may one man have such power? Would not this be a despotism?

The answer made by the President to these questions was so unmistakably correct that only the most violent partisanship ever ventured to dispute his conclusions. The President found the charter government in possession of authority which for over half a century it had exercised under the Federal Constitution, with full recognition and acquiescence on the part of the Federal authorities and of the people of the State. Whatever might be his individual views of this charter government—of its justice, of its acceptability to the majority of the people governed by it, of its correspondence to the advanced ideas of republican institutions which then prevailed—he had as President only the right and duty to recognize the existing facts. Questions of theoretical right whi h might lie back of these, were not for him to determine; what he must recognize and act upon were the attempt by dissatisfied parties to set aside by force the constituted authorities, and the demand by those authorities for his assistance. These made a clear case for his action under the Constitution, and left him no discretion. Any despotic authority in the premises was not that of the President, but of the Constitution, and had been agreed upon for precisely such emergencies. He must obey its command, or he would become a public criminal, subject to impeachment and to removal from his high office. The theory of the Federal Constitution was that grievances under those of the States must be submitted to until they could be changed in accordance with established forms. Attempts to change in other modes would be attempts at revolution, and these were to be suppressed by force. The President, in his message to the House of Representatives, under date of April 9, 1844, pointed out very clearly the danger, and indeed the inconsistency with settled government, of any other course.

"I must be permitted," said he, "to disclaim entirely and unqualifiedly the right on the part of the executive to make any real or supposed defects existing in any State constitution or form of government, the pretext for a failure to enforce the laws or the guarantees of the Constitution of the United States in reference to such State. I utterly repudiate the idea, in terms as emphatic as I can employ, that these laws are not to be enforced, or those guarantees complied with, because the President may believe that the right of suffrage, or any other great popular right, is either too restricted or too broadly enlarged. I also with equal strength resist the idea that it falls within the executive competency to decide, in controversies of the nature of that which existed in Rhode Island, on which side is the majority of the people, or as to the extent of the rights of a mere numerical majority. For the executive to assume such a power, would be to assume a power of the most dangerous character. Under

such assumptions, the States of this Union would have no security for peace or tranquillity, but might be converted into mere instruments of executive will. Actuated by selfish purposes he might become the great agitator, fomenting assaults upon the State constitutions, and declaring the majority of to-day to be the minority of to-morrow, and the minority in its turn, the majority before whose decrees the established order in the State should be subverted. Revolution, civil commotion, and bloodshed, would be inevitable consequences. The provision in the Constitution intended for the security of the States would thus be turned into the instrument of their destruction. The President would become in fact the real constitution maker for the States, and all power would be vested in his hands."

What the President so forcibly said of his own want of authority to correct real or imaginary evils in State government, is equally true of Congress, and we may assume that his remarks were limited to his own office because in the particular case only his own action had been invoked. A practical construction was thus given to the Federal powers, which was not only manifestly in harmony with the purpose of the Constitution, but which rendered them entirely safe, and precluded their being made the pretext for encroachments upon State authority. Moreover, this construction was accepted by the people as correct. The party of that day which was in sympathy with the new movement in Rhode Island, though displeased at the result, showed little disposition to take issue with the President's conclusions. When distinctly confronted with the proposition to admit Federal interference in the formation or establishment of State constitutions or laws, the traditions of the Democratic party would be too powerful to permit it to take centralizing ground for any mere temporary purpose.

The fact that the President of his own authority gave or promised the assistance called for in this instance, renders it proper to notice that the section of the Federal Constitution under discussion differs in its phraseology from other sections which confer power and impose duties on the General Government. Elsewhere it is provided what Congress may do, or to what the judicial power shall extend, or what shall be the scope of authority and duty of the President. But the obligation to guarantee a republican form of government to the States, and to protect them against invasion and domestic violence, is one imposed upon "the United States." The implication is that the duty was not to depend for its fulfillment on the legislative department exclusively, but that all departments of the government, or at least more than one, were or might be charged with some duty in this regard. It will be seen hereafter that it has been Congress which hitherto has assumed to act upon the guarantee,

while application for protection against domestic violence has, on the other hand, been made to the President. The difference may be attributed to the fact, that to enforce the guarantee, legislation would generally be requisite, while protection against domestic violence would involve only the employment of a military force, which the President would always have at his command. From the nature of the case, the judiciary can have little or nothing to do with questions arising under this provision of the Constitution. What constitutes a republican government, and what under any given circumstances it may be found necessary to do in order to protect it, must in their nature be political questions, and require determination by the political departments of the government. When such questions are thus determined, the judiciary must accept and conform to the decision; or, as Sir Matthew Hale pointed out in the time of the Commonwealth, the state would be reduced to anarchy. The Federal Supreme Court has invariably disclaimed all right to review or question the decisions of the political departments of the government on political subjects. Questions regarding the force or extent of a treaty; the rightful government to be recognized and treated with; the extent of the territorial limits of the country; whether at a particular period of time a State government had superseded the territorial: these and all other questions properly falling within the same category are addressed first of all to the treaty-making or law-making authority, whose decisions conclude all others. Mr. Justice Woodbury pointed out with remarkable clearness, in his opinion in the case of Luther *versus* Borden, arising out of the Rhode Island controversy, how unsuited was the judiciary to the consideration of such subjects, and how dangerous it might prove to the liberties of the people if a tribunal composed of persons selected for other purposes, and whose decisions are expected to be uniform and can not conform to the varying demands of circumstances and of public policy, were to be clothed with the power to decide them. It is fresh in our recollections that all attempts to bring the validity of the reconstruction laws to a judicial test were unavailing; Congress interposing very effectual obstacles in some cases, and the Supreme Court, when direct application was made to enjoin the President and his subordinates from putting them in force, refusing to consider them on the merits, on the express ground that they involved "rights of sovereignty, of political jurisdiction, of government, of corporate existence of States with all their constitutional powers and privileges," and that these

did not belong to the jurisdiction of courts.* The correction of wrongs, mistakes, abuses, or even usurpations of which in such matters the legislature may be guilty, is not confided to the courts. Perhaps we should speak more in accord with the proper theory of constitutional government, if we were to say that the courts are not at liberty to impute wrongs, mistakes, abuses, or usurpations to the legislature, when acting upon questions purely political.

Having seen what was settled in the case of Rhode Island, we may now pass to subsequent cases in which the guarantee of the Constitution has been appealed to or relied upon. These cases have not been numerous, and in some of them it is not easy to determine how far the Federal authorities regarded themselves as acting under the command of the Constitution, or, on the other hand, obeying a great law of necessity in an emergency for which no provision had been made. This was particularly the case at the close of the great rebellion. The proper method of reconstruction of the seceded States was then a most momentous problem to the statesmen of the country, and the most diverse and irreconcilable views were entertained, not only in the opposing parties, but also among the leading minds in the dominant party. It was a problem on which, when it came to be solved, the President separated from his party, and the representatives of that party in Congress proceeded in their legislation with such uncertain steps that much of their action it was deemed prudent to do over again; and governments were recognized and afterwards set aside with more regard to a supposed necessity than to consistency of action. The view of Mr. Sumner was, that so far as the rebel States were concerned, no government should be recognized as republican in form which tolerated slavery, or which excluded persons from the privilege of suffrage by reason of race or color. That this view prevailed in Congress is not to be affirmed; that it had more or less influence is undoubtedly true; but it would seem equally clear that while the majority in Congress kept a distinct and definite object in view, they did not inquire very closely into the legal justification for the measures resorted to. The times were extraordinary, and in their opinion the future peace and welfare of the country required that the seceded States should be excluded from the full privilege of the Union until the abolition of slavery was accepted. Even then the exceptional control of Congress over them as States was not removed until impartial suffrage was assured. Whoever followed the pro-

* Georgia *versus* Stanton, 6 Wallace's Reports, 77. Cases recognizing the same general principles are referred to in the arguments of counsel and the opinion in this case.

ceedings and debates of Congress during the period of reconstruction could not fail to observe that much of the mention of republican government, in the complaints against the Southern States, had no reference whatever to the constitutions which established the framework of government in those States, but was aimed only at wrongs or abuses existing or supposed to exist, or to be possible, under those constitutions. Yet it was not claimed on any side that for such wrongs and abuses the guarantee of the Constitution had made provision; and to suggest that guarantee as the justification for Federal interference was to suggest the right, if not the duty, of the Federal Government to interfere in every case in which the administration of State governments did not accord with the view prevailing in Congress as to the method of administration, or the results to be expected from the governments which, under the protection of the Federal Constitution, had been established in the several States.

The Supreme Court of the United States, when considering in Milligan's case the validity of military commissions for the trial of offences against the government in the loyal States, repudiated the doctrine which sometimes had been advanced, that when war prevailed the Constitution must be silent; and declared that the guarantees of liberty by that instrument were established for all times and all circumstances. The declaration was of a wholesome truth; but if either of the judges who concurred in it, or any other person shall ever expect the same careful observance of the constitution and laws, either by the people or by the constituted authorities, amid the excitements and passions begotten of war, as is usually witnessed in time of peace, he will find little to justify the expectation in the experience of this or any other country. In adjusting the relations of the rebel States to the General Government, and in conforming their constitutions and laws to the condition of affairs which accompanied and followed the destruction of slavery, many things were done which all must now concede it was impossible to justify upon the letter of the Constitution, and which their authors and supporters must defend on the ground that from the extraordinary circumstances such an imperious necessity had sprung as the framers of the Constitution could not possibly anticipate, and therefore, could not provide for. How far this defense should in any particular instance be accepted as conclusive and satisfactory, is a question not necessarily involved in the present discussion. What now concerns us is that these extraordinary cases of congressional intervention shall stand exceptional, and not be justified on the guarantee of the Constitution, and accepted as the guides and

precedents for future action. To accept them as such would be to put an end to the constitutional union made known to us in the writings of the "Federalist," and expounded in the decisions of Marshall, Story, Taney, and Chase. It would be to brush away all limitations to the powers of Congress in its dealings with the States, and to leave that body at liberty to do what in the good pleasure of its majority it shall please. With slavery destroyed we should be at liberty to believe that the exceptional circumstances can never again arise; and that consequently no one will ever again feel impelled to justify Federal interference in the State affairs, on pretense of a duty to guarantee a republican form of government, when the form of government which had been originally established in the State with the approval of Congress, is still retained and administered. Whatever discontented parties may do or say when the workings of State government displease them, there is a manifest and imperative duty before every statesman and every lawyer, to resist and if possible to defeat whatever shall have a tendency to make the shifts and devices of a revolutionary period the precedents for similar action after that period has passed away. If action, which at the time was deemed wholly exceptional, and was only defended on the exceptional circumstances, can be received as evidence of settled law in the government, and if the people shall be found prepared to accept it as such, then indeed has a revolution of public opinion taken place which sooner or later must work an entire and radical revolution in the Government itself.

The cases which have occurred since reconstruction was treated by the Federal Government as complete, though in every instance having more or less connection with the reconstruction measures, and springing more or less directly from conditions which were the legitimate consequences of the war, must nevertheless be brought to the test of strict law. When once the war was entirely at an end, the excuse of its overruling necessity was no longer admissible, and the need of securities for peace could no longer be urged after all which were demanded had been given and accepted as sufficient. If since that time the domain of State government has been invaded by Federal authority without the warrant of the Constitution, no hesitation should be exhibited in any quarter in visiting the act with such unequivocal condemnation as shall afford no encouragement to the like ventures in the future. It is not a light thing for that supreme central authority which was created by the States with certain limited and defined powers, in order to promote union and insure domestic

tranquillity, to turn upon the States with the power thus conferred, and employ it for their humiliation or degradation, with the inevitable result of weakening the union and promoting discord. The boundaries of authority were fixed by solemn covenant, and deliberately to break this in the smallest particular, would be deliberately to break the bonds of union, to sow the seeds of distrust, and to furnish the excuse for future violations, which in the end would make the covenant itself not a friendly partition of powers, but a hostile frontier across which contending parties would charge and be driven according as one or the other should from time to time prove strong enough to take the aggressive.

The case of Louisiana in 1872–3, no attempt has been made of late to justify on the principles of the Constitution; and without entering into a discussion of its facts, we leave it as it was presented in the Senate report of February 20, 1873, where it stands as a case of undeniable usurpation. The conclusions of fact in that report were concurred in by some of the ablest lawyers of the nation, representing all political parties, and they were supported and illustrated by the speeches of Mr. Carpenter and others, delivered in the Senate in 1874. With these speeches may usefully be read and considered that of a person who was prominent in the whole affair—an adventurer made politician by the times—who for awhile under military protection, but without a shadow of right, acted as governor; who had the surprising assurance to claim an election to both Houses of the same Congress, and to contest a seat in each, and who, as the agent of the Associated Press in his official report informs us, treated the house to a "humorous" speech in describing the mockery of right, justice, and law, which, as he declared, had been substituted for an election in that unhappy State. There can be nothing to compare with such "humor," but the "amusement" with which the friends and supporters of the governor in one of the reconstructed States are said to have received the announcement that he had been indicted for the larceny of public moneys!

The chief actors in the tragedy of Louisiana were a few adventurers, a few inferior Federal officers, and an inferior Federal judge. The general voice, not only of the country as a whole, but of each party in the country, has condemned the action, and therefore, though the wrong done has never been redressed, it may at this time be passed over without comment. A reasonable conclusion will be that that which stands reproved in all official reports, will not be relied upon as a justification by any one who hereafter may be tempted to

repeat it. It took place in a State one half of whose citizens were still ignorant and unaccustomed to the enjoyment of political privileges, and might easily be made either the victims or the instruments of conspiracy or wrong. And it was so soon after the great war in which *de facto* governments had been overturned by military authority and others dictated in their stead, and so many of the prejudices and suspicions which the circumstances had begotten were still active and violent, that we can not wonder the complaints of arbitrary and unlawful interference did not attract the notice and receive the prompt attention they deserved, or find the remedy that was adequate and appropriate.*

We come now to the case of Arkansas, in which again the President was called upon to suppress domestic violence under circumstances requiring a decision between adverse claimants to the executive office. But here the case differed from that of Rhode Island, in that there was no attempt to set aside an established constitution and no purpose expressed to disregard the laws; but each claimant acknowledging the same constitution, and professing obedience to the same laws, only attempted to make good the assertion that he had been chosen governor under them. The contest was consequently one as to an election, and in its inception should have involved only the question, Which candidate had received the greater number of lawful votes?

The situation when the President's interference was demanded was this: Baxter and Brooks had been rival candidates before the people, and the former had been declared duly elected, and had taken upon himself the office. Brooks asserted that the result was accomplished by various frauds, and by wrongful rejection of votes, and he contested it before the legislature, where the decision was against him. On a case arising in the Supreme Court which presented the point, that court decided it had no jurisdiction to interfere. In

* A majority of the house committee of the judiciary of the present Congress reported in favor of the impeachment of the Federal judge, who was the chief figure in this usurpation, but the report has not been acted upon. One learned member of that committee, himself a jurist of honorable reputation, dissented from the condemnation of this judge, and certified to his character as a "Christian gentleman," which he seemed to think should be an ample shield against accusations of criminal conduct. It is always gratifying when the upright officer is found to unite with other qualities a gentlemanly deportment and a Christian humility, but to excuse great public offences behind deportment and profession is, to say the least, unfortunate. For while such considerations are entirely foreign to any investigation of official conduct, it is not to be denied that bringing them forward where they have no place, and in such a connection, must have an inevitable tendency to subject them to public contempt and derision.

this the court was unquestionably right. A disputed election to the office of governor may of necessity present questions for judicial determination when no other tribunal has been designated for the decision of the contest, but there are many reasons why the more suitable authority for its settlement is the legislature of the State, which can act promptly and without regard to forms, while a judicial contest might continue for months, possibly even for the whole term of office, and be embarrassed more or less with questions of pleading and technical law, to the incalculable prejudice of public interests and the public order. And by the constitution of Arkansas, the legislature had wisely been vested with complete and final authority in the premises.*

Brooks nevertheless insisting that a majority of the electors had cast their suffrages for him, began suit in one of the circuit courts, but, on a demurrer being interposed, allowed the case to sleep. It would be wandering from the present discussion to enter upon the inquiry whether the assertion of Brooks that he was cheated out of his election, had any foundation in fact. If he was, a great outrage was perpetrated upon his rights, and a greater upon the people of the State. No offence against property, and no wrong to individual persons, can compare in enormity with such a robbery of political rights. But this could have no bearing upon the case, as it was afterwards submitted to the President. Contested elections, like all other controversies, must be submitted to the determination of some competent tribunal, and, satisfactory or not, right or wrong, the decision must be sustained, or there can be no end to controversy and no settled government. It is far more important to the people that the executive power should be unquestionable, than that any particular person should wield it. Brooks was not the first person wrongfully

* The section of the Constitution is as follows: "The returns of every election for governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney-general, and superintendent of public instruction shall be sealed up and transmitted to the seat of government, by the returning officers, and directed to the presiding officer of the Senate, who, during the first week of the session, shall open and publish the same in presence of the members there assembled. The person having the highest number of votes shall be declared elected; but if two or more shall have the highest and an equal number of votes for the same office, one of them shall be chosen by a joint vote of both houses. Contested elections shall likewise be determined by both houses of the general assembly, as is, or may hereafter be prescribed by law." To our mind there can be no plausible suggestion that the decision of the general assembly on such a contest is open to judicial review afterwards, but it may not be inappropriate to refer to Grier *versus* Shackelford, S. C. Const. Rep., 642; Batman *versus* Mcgowan, 1 Metcalfe's Ky. Rep., 533; State *versus* Marlow, 15 Ohio State Rep., 134; People *versus* Goodwin, 22 Mich. Rep., 496, which are in point.

counted out in a contest for the office of governor. To pass over cases in regard to which there may be question, we may refer to that of Chief-Justice Jay, who met the same fate in his candidature against Clinton, and though his incensed and excited followers appealed to him to resist, he chose the wiser and more patriotic course, and bowed in submission to the unjust determination of the canvassers. The result proved that the State did not suffer from this wrong, the cause of order suffered only temporarily, no one suffered in public respect and reputation but the canvassers and their supporters, and the great jurist, by his implicit obedience to the law under circumstances of such aggravation and injustice, was elevated to higher position in the public regard. Had that eminent example been followed in Arkansas, the country would have been spared some excitement and the people of that State some expenditure of money and military display. That it was not followed is due to one of those sudden mutations in State politics which, as they have occurred in the reconstructed States, have so mystified the people of the country, until the personal interests which lay back of them were brought to light and explained. If Brooks was cheated out of his election, it was through a combination which embraced the leading politicians of the State, and placed some of them in Congress. So long as the parties hung together there was peaceful acquiescence in the legislative decision. But the time arrived when, for reasons of their own, the others were found disposed to rid themselves of the governor, and for that purpose ready to make use of measures as objectionable to get him out as those by means of which he had been put in. It was under such circumstances that the sleeping suit appears to have taken on new vitality, the extraordinary decision of the Circuit Court that Baxter be ousted as a usurper and Brooks installed in his place was made, and then the State House and public records were seized, and then came the call to arms.

If in the light of the facts stated, the duty of the President to support Baxter can be less clear than was the duty of Mr. Tyler to support the charter government in the Rhode Island case, the grounds of doubt are certainly not very manifest. The tribunal which the State constitution had given complete authority in the premises, had decided the election, and the President could not go behind the record, and was not at liberty to question the conclusion. Baxter was governor *de facto*, and by the adjudication of the legislature he was also governor *de jure*. The President had nothing to do but to recognize the existing *status*, and respond to his demand for assist

ance. He was no more at liberty to inquire into the facts of the election with a view to bring his own judgment to bear upon its legality and fairness, than Mr. Tyler was at liberty to inquire into the justice of the complaints made against the Rhode Island charter. The President was not the tribunal to which complaints of hardship or injustice could be made in the one case any more than in the other. Some attempt was made to confuse the controversy, by bringing out a remarkable expression of opinion by a majority of the judges of the State Supreme Court in support of the judgment entered up at the Circuit; but this paper calls for little remark. It was the mere *dictum* of the judges in a collusive case, and it referred to a subject which plainly by the Constitution, as they had previously held, was taken from their jurisdiction. The President was manifestly right in disregarding this document, as he would also have been in disregarding the so-called judicial action which was had in the Louisiana case.

And here it would be agreeable to leave this controversy, where it was left by the wise and just determination of the President, if the parties concerned had permitted that determination to conclude it. But as action was afterwards taken in Congress on the subject, and the future possibilities of the case are of the highest importance, it may be well to consider it a little further. And this may render it necessary to give some attention to the boundaries of executive and legislative authority, since these departments of the government may possibly in any such case be found to differ in their views regarding the course to be pursued, and to diverge in their action.

Of course the necessity in the President to decide between two claimants implies a possibility that he may decide in favor of either. It was legally possible, therefore, that in this case he would decline the request he acceded to, and respond to one from the opposing claimant. Had he done so, the temporary result at least would have been a revolution in State authority. The mere statement of the possibility is sufficient to suggest the immense power that may be wielded by the Federal executive. Our holiday orators delight with patriotic fervor to draw distinctions between our own and other countries, and to declare that here the law is master and the highest officer is but the servant of the law, while even in free England the monarch is irresponsible and enjoys the most complete personal immunity. But such comparisons are misleading, and may prove mischievous. In how many directions is not the executive authority in America practically superior to what it is in England? And can we say

that the President is really in any substantial sense any more the servant of the law than is the Queen? Perhaps, if we were candid, we should confess that the danger that the executive may be tempted to a disregard of the law may justly be believed greater in America than in countries where the chief magistrate comes to his office without the selection of the people, and where consequently their vigilance is quickened by a natural distrust. Edward Livingston, through bitter experience in his own person, had occasion to observe this, and in his protest against the arbitrary and high-handed action of the President to declare that,

"The gloss of zeal for the public service is always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favor, which when viewed in its true light, would be found a fatal blow to their rights. In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause, for acts which would make a tyrant tremble on his throne."

We trust because we have chosen; "we wink in slothful overtrust;" and yet the man of our choice may possibly come to deserve the invective of Mr. Livingston, "the magistrate of a free people playing the Tartuffe of liberty—adoring it in theory, but in practice violating its most sacred principles."* Perhaps it would be safer always to assume, as some writers have insisted was only reasonable, that in power all men are depraved, wicked, and corrupt, and that protection against the oppression of rulers can be found, not in their character or sense of justice, but only in mutual checks, restraints, and opposition of powers.† We establish the mutual checks and restraints, but proceed then to cast the mantle of charity over the officers of our choice, and to assume and persist in the assumption that, in their action, whatever is is right.

The executive power in this country is certainly to be administered under the laws, and the President is the servant of the law and not above it. But to say this, is not equivalent to saying that the law must be declared for him through the judgments of courts. We have seen already that as regards political questions the courts cannot pronounce the law, but must take it as it is given by Congress and the President. There may be other questions, which from their very nature can not come before the courts, but must appeal *ex necessitate* to the executive department for solution. Of this description was

* Hunt's Life of Livingston, ch. 8.

† Montesquieu's Spirit of the Laws, b. xi., c. 4; Chipman on Government, 44.

one which during the war arose in Missouri. The Supreme Court was set aside by constitutional ordinance, if the ordinance itself was valid, and a new court established instead. The old court declared the ordinance void, but the governor, holding otherwise, removed the judges from the official rooms by force, and caused the new appointees to be inducted into office. For such a question only this or a similar solution was possible, for the old incumbents could no more decide it than the new, and for either set to assume the right to decide at all, was to assume that they were the lawful judges, which was the very point in controversy. Something analogous occurred in Texas after its last election, and it is possible for the Federal executive to encounter questions involving a similar necessity. But in other cases, though the nature of the question may not be such as to remove its consideration from the judicial forum, if only executive duty is involved, we know of no authority for bringing the President before the courts, in order either that the duty may be performed under their direction, or that after its performance their judgment may be had concerning its legality or propriety. The executive, like the judiciary, constitutes an independent department of the government, and his decision in the line of his duty is as conclusive upon others as are the judgments of courts. It may be wrong, and so may be theirs; it may be corrupt, and unfortunately there may be corrupt judgments also: the remedy is the same in both cases. There can be no appeal from the one to the other; but for dishonesty, false judgment, or oppression, there may be punishment of either on impeachment. Even Mr. Webster, who argued so strongly for the supremacy of the law as it had been declared in adjudged cases, argued only the duty of the President to accept the conclusions of the courts, and did not assume that he could be compelled to do so. It is clear that the executive could not be subjected to compulsory process in any case, without degrading the executive authority to a position of inferiority and dependence.

Executive action, however, is almost always subject directly and immediately to the control of Congress, except in so far as it is made independent by the Constitution itself. No one can doubt its being subject to the direction and supervision of Congress in cases like those we have been considering, and if action has hitherto been left to the discretion of the President in these cases, it was not because Congress was without power in the premises, but because of the neglect of Congress to act, which would imply its assent to what was being done. Undoubtedly Congress is the proper authority to determine questions of a political nature as they arise within the sphere of the Federal

powers. If the President shall have occasion to take action first, his action can be little more than provisional; to stand unless set aside by Congress; and if he shall usurp authority, if he shall disregard the law, if he shall violate constitutional right or decide corruptly, the duty of Congress to give the appropriate and adequate redress will be plain and imperative.

The indirect appeal which was taken to Congress from the action of the President in the Arkansas case was complicated, as all such cases are likely to be, by the political sympathies of members with the parties more directly concerned. But the President's position was so clearly right that an open attack upon it was not be ventured upon. He had found a State controversy closed by State adjudication, and he had refused to open it. He had responded to the demand of the Constitution instead of listening to those who would invite partisan action. But the resources of men who had taken lessons in the reconstruction of a State like Arkansas were not likely to be exhausted by any direct and open measure that might be resorted to or proposed. It was not forgotten that since the close of the civil war, vague general language concerning the guarantee of a republican government had sometimes been employed with good effect, and that, without any distinct specification of the grounds of action, Congress in some instances had been enabled to exercise most important powers in shaping State policy and government. It might be quite true that the President's action, when clearly right in point of law, would carry a weight rendering a direct assault upon it useless, but might not a resolution of inquiry, whether the State maintains a republican form of government, be employed effectively by indirection to accomplish the same purpose?

A resolution of inquiry may seem a very harmless measure; just as perhaps it seemed to Hastings when Gloster demanded

> "What they deserve
> That do conspire my death with devilish plots
> Of damned withcraft;"

—just as it might have seemed to Luther journeying to Worms, had he not known that the power that inquired, might also on its own reasons condemn and execute. In times like the present, when the highest considerations of duty demand of every citizen that he should be active and vigilant in bringing the nation back to an exact observance of constitutional obligations and rights, if an exceptional measure be resorted to, it can never be unimportant to inquire why it is

taken, what it means, to what it tends, and what it threatens. And this is peculiarly important if we find the measure receiving support from only one party, and that an endeavor by the opposing party to extend its scope, so as to embrace another case coming apparently within the same reasons, is defeated. Such was the case here,—the resolution of inquiry receiving no support from the opposition, who vainly endeavored to secure an amendment which should include South Carolina. The case, therefore, assumed something of the appearance of a party contest in Congress over the rights of a State.

The sincerity and patriotism which led the majority in Congress to the adoption of the resolution are not to be questioned. But back of these was the pressure of local politicians who came forward after a long-continued and most suspicious delay, to make charges which, if true, should require some of them to vacate important public positions and retire to the private life to which they were seeking to force the acting governor. It would be reasonable to expect that whoever should demand such an inquiry would bring forward against the State the charge of a failure to maintain a republican form of government, because, when the State authorities called for no intervention, such a charge alone would justify action. But no such expectation would be justified by the facts. No member ventured to rise in his place in Congress, and assert that the republican constition of Arkansas had been set aside, or that the government was not being administered according to its forms. There were indeed accusations that the governor had been elected by the assistance of fraud; that some members of the legislature had been unjustly deprived of their seats, and that disorder and violence were rife in the State. The first two charges were not only disposed of by State adjudication, but also by a peaceable acquiescence which rendered it in a high degree unwise and impolitic to open the subject anew, even if it were competent to do so. As to the third, there was no pretense that the State authorities were now demanding aid in maintaining order. The charges, then, if true, made out no case for Federal interference; and they could not be assumed to be true, because two of them had been heard and decided against, and the third under the Constitution was only to be shown by a demand from the State authorities, which was not produced. Nevertheless a resolution was passed which necessarily implied the existence of a *prima facie* case against the State of a failure to maintain republican government; and to inquire into the truth of this, a committee of investigation was ordered.

The composition of the committee gives reasonable assurance of a fair investigation with the purpose to reach correct results. But such an investigation, with whatever purpose ordered or by whomsoever conducted, necessarily assumes a threatening attitude toward the State. No inference that it is entered upon as a mere matter of form is admissible, but it must be supposed that the House regarded it as based upon grounds which were sufficient, if they should be supported by the evidence. The inquiry, then, is whether the State maintains such a form of government as the Federal constitution recognizes, and the remedy, if the charges, actual or implied, are sustained, can be nothing short of the substitution of some other government for that which in this State falsely assumes to be republican. In other words, regarding the investigation as ordered in good faith and for proper purposes, the exact case is this: A disturbed condition of affairs being found to exist in one of the States, one House of Congress raises a committee to inquire and report to that body whether the State government should not be set aside, and some other—which necessarily would be of Congressional invention or suggestion—provided in its stead. If the investigation contemplates possible action, if it has in view any other purpose than merely the gratification of public curiosity by an exposure to the public of the local politics of a State, it can not mean and can not threaten less than this. It thus has an inevitable tendency to suggest that the precedents of reconstruction may properly be perpetuated, and that the States may be made to hold their political rights on the tenure of a behavior that is satisfactory to the Federal authorities. For ourselves, the concession must be made that in the condition of Arkansas little has been discovered for some years that is particularly gratifying, but the denial is emphatic, that a republican form of government implies that the State is always to be free from disorders, or that decisions upon contested elections shall always be just, or that the State administrations shall always be in harmony with those elected by the people—or by themselves—to Congress, and subject to be set aside when those persons withdraw their support. And for a State government to be tried for its existence upon vague general charges constituting no triable offence, before a body which, however pure, honorable, and patriotic it may be, will yet measure for itself its own powers, and be but too prone to judge all political questions from the stand-point of party interest, is no more a light thing than it would be for a civilian to be put on trial before a court-martial on charges of which such a court could have no jurisdiction, but under

circumstances which should render its decision upon its authority a finality. What matters it that the Constitution forbids, if Congress wills it and no other authority can interfere? There is an old proverb that for sovereign power all laws are broken; and this may prove as true of a Congress as of a Cæsar.

Of the propriety of a like inquiry as demanded by the opposition in the case of South Carolina, we must judge from the complaints which are publicly made of the condition of affairs in that State. The current complaints are that ignorant freedmen constitute the controlling majority of electors; that they choose worthless adventurers, ignorant field-hands, and dishonest schemers to public offices; that the governor is notoriously dishonest and criminal, and that the public are systematically plundered by him and by other officers to whom he gives immunity by his prerogative of pardon. These charges are of the same general nature with those but recently made against the government of New York, and do not go a step beyond them, except in implicating the chief executive in the prevailing corruption. Even in that particular the difference is not great, for the governor of New York was persistently charged with being influenced in his official action by a dishonest combination which controlled the city, and through the city controlled the State. If, therefore, these charges justify setting aside a State government in South Carolina, then the government of New York should have been set aside by Congress without waiting the action of societies of political reform. But in that case, as in this, the real complaint was not that the State failed to maintain a republican form of government, but it was that the basis of suffrage had been made so broad, that classes unfit to govern were enabled to rule. The complaint was not of too little republicanism, but of too much. The evil had been brought upon South Carolina by the deliberate action of the people of the Union in amending the Constitution, and it could only be cured by retracing the step, or by the gradual education of the people in their duties and obligations as citizens. The former no one proposes; the latter is a work of time, and may leave the people of that unhappy State for a period exposed to the rapacity of adventurers, but in the end is expected to vindicate the theory of our institutions. One thing is clear; to concede to the Federal government authority to take to itself State powers, on an assumption that the people of a State have shown themselves incapable of self-government, and must consequently be ruled by the strong hand of the central power, would be to concede the failure of the American experiment in government.

A Congressional investigation, it must be repeated, can never be harmless when it is ordered on grounds or under circumstances which have an inevitable tendency to strengthen, encourage, and perpetuate the unconstitutional notion that Congress may rightfully intermeddle with and overhaul State affairs and State governments whenever any thing in their administration shall be displeasing to the majority in that body. Such proceedings are necessarily in the direction of substituting for the republicanism, agreed upon in forming the Constitution, a different republicanism whose manifestations as we witness them in the neighboring republic of Mexico are not assuring to those who have faith in government by the people. It is not always certain that investigations will be in the hands of jurists, skilled in legal forms and principles and disposed to act under the guidance of settled rules, but they are as likely to be instigated in times of high party excitement, under the leadership of men—of whom unfortunately we still have some—whose political training has been such as to lead them to look upon the ballot-box as an instrument of no more sanctity than any other with which a game may be played for the profit of the player. They may come at a time of presidential election, and be the pretense by the aid of which the result may be controlled. They may assail one State because she does not better enforce her prohibitory legislation, and another because she disgraces republicanism by not paying her debts, and a third, perhaps, when a majority of the proper stamp shall appear in Congress, because she sends her "statesmen" to a convict island, instead of making them governors and senators. In short, any thing may be suggested as possible when the whole subject is thrown open to a Congressional discretion, proverbially prone to be carried away by the passions and excitements of the hour.

The case of Rhode Island ought to be regarded as settling for all time the two points involved in it: 1, That the President and Congress must continue to recognize and support the constitution once established in a State, and regularly accepted as republican, against any revolutionary measures that may be instituted for its overthrow; and 2, That their action in the premises is not subject to judicial review. The first point was determined by the action of the President, under the advice of Mr. Webster, acquiesced in by Congress and the people under circumstances implying a clear approval. The second was settled by the unanimous opinion of the Supreme Court, approved on several occasions after its membership had almost wholly changed. The case of Arkansas should settle in like manner, by the

acceptance of the President's conclusion, the doctrine that as between two persons claiming the State executive authority, if the proper and competent State tribunal has rendered decision, such decision must be accepted and followed. Any other doctrine must strike at the foundation of State government, and leave Congress and the President supreme.

There is yet one other case which might stand apart from these, and in which no action within the State could constitute authority or furnish guidance for that of the Federal Government. There might be such a forcible or fraudulent usurpation of all departments of a State government as would render a competent decision on questions of contested election impossible. Obviously the decision of a usurping legislature that a usurper was lawfully chosen governor, could bind no one. But to suppose such a case with sufficient following to make it successful, would be nearly equivalent to supposing the people unfit for self-government. Something similar was once tried in Wisconsin, where a governor declared himself re-elected, and denied the right of any other authority to question the declaration; but though he was head of a party embracing half the voters of the State, and which would lose power by his defeat, the attempt was a miserable failure. The worst there is reason to look for is such a setting aside of the will of the people under technical quibbles as was accomplished in the case of Jay; and in such cases the people will bow to the decision of the law, even though they believe it to be bad law. A case of pure usurpation, unless the people are kept down by military force, can scarcely fail in some form to encounter prompt and effective opposition sufficient to render its success impossible. In the absence of military force, or of outside support to the alleged usurpation, it should generally be conclusive against the allegation that the authority set up has been quietly submitted to until the ordinary business of legislation has been transacted, laws made, put in operation and acted upon by the people as part of the law of the land The law of limitation which public policy would establish for complaints of that nature, must be short and conclusive, or the civil state may be kept in a condition of chronic disturbance and unrest from the uncertainty of its legal foundations. It should be observed also as regards such a complaint that an unjust deprivation of one or more members of their seats in a legislative body does not make out a usurpation of legislative authority; if it did, it is feared that a case might be made against Congress as conclusive as has ever been set up against a State; for all parties have been quite too prone to dispose

of contested seats on partisan grounds. A legislative body being the final judge of the election and qualifications of its members, any number of decisions believed to be unjust or erroneous, can furnish no excuse for interference: it is only when a body of men not constituting a legislature in fact, assumes to be such, and performs the mockery of admitting and rejecting claimants to seats, that its decisions can be treated as nullities. When such a case shall occur, it will be pertinent to inquire where are the true members, that they fail to meet and effect a legal organization? If, without compulsion or the terror of military force or threats, they abstain from doing so until the usurpers possess themselves of the authority of the State and exercise it with general consent, the rule of repose already referred to may justly be applied against them to bar their complaints; while if they were restrained by violence, or overcome by force or threats, their appeal for external assistance should be as prompt as the circumstances may admit, lest public acquiescence may introduce unnecessary difficulties. We therefore say that, while it is possible there may be such a usurpation of the whole State government, or at least of the political departments thereof, as may render the intervention of the Federal government imperative, yet after any considerable delay not compelled by force the presumptions should be conclusive against it; and the thing is in itself so improbable, and its success, unless the people are held in subjection by military force, so extremely unlikely, that a very clear *prima facie* case should be presented to Congress before its intervention should be secured. To invite Congress without sufficient cause into the field of State politics must generally but add to party feelings and prejudices, and thus intensify instead of solving the local difficulties. Partisans are not likely to come, as Mr. Madison's sanguine mind anticipated they would in such cases, prepared to act between the rival claimants with the impartiality of judges and the affection of friends. They are more likely to come with feelings sufficiently wrought up to tempt them to make the rights of the State itself a mere foot-ball in party politics. When there are no effective checks and balances, usurpation with wonderful ease

> "broadens slowly down
> From precedent to precedent."

Against the encroachments of Federal authority upon the States, the effective checks, if any, must be found in the wisdom and patriotism of rulers. The States, when wronged, must appeal for justice to the power that wrongs them. They must, if possible, awaken to vig-

orous activity the constitutional scruples of members of Congress. If every member of that body were a statesman, accustomed to look beyond the politics of the day in determining his action, the danger of overriding the just local powers would be less imminent; but it is unfortunately the case that too many concern themselves only with the probabilities of political storms in the immediate future, and that to avoid harm from these is the political wisdom of many party leaders. The statesman can not bound his horizon by the necessities or policy of his party, and can not handle questions of state from regard alone to party interest or party advancement. Parties are useful as they constitute checks upon each other, and tend to keep the people vigilant in watching for abuses under the laws, and for encroachments upon the Constitution; but when encroachments are once admitted which may appear to tend to the advantage of any party in power, it is possible for all to tolerate and in turn to practice them. Invasions of State authority for national or local party purposes are precisely of this nature.

Deprecating as every good citizen must, all Federal interference in State affairs except in strict conformity with the Constitution, it seems proper to remark that a habit of looking to Washington for almost every thing has been growing of late among State officials, and that instances might be given of calls by States upon the President for troops to put down local riots and disorders so insignificant in themselves that any sheriff of an average share of courage and vigor would have found ample resources for their suppression in the ordinary civil posse. A governor who makes such a call without necessity confesses his own inadequacy to his position. It should also be said that while the existing administration has subjected itself to severe criticism for certain cases of interference, it has an undisputed claim to commendation in other cases of refusal. We refer particularly to the case of Texas, in which military aid was called for to enable a defeated administration to hold on to office, and to that of Mississippi in which troops were demanded on pretense of "preserving order" at an election. The President refused in the latter case, on the technical ground that the demand was not in strict conformity with the Constitution, but no secret was made of the fact that back of this was the reason that the demand was wholly unnecessary, and that the troops, if sent, could have no mission unless to overawe electors. The result demonstrated the President's wisdom, for a more orderly election has never occurred. The Texas case was peculiarly one in which no decision within the State could aid the President. An election had

been held, which, if valid, was to make an entire change in the State government, the judiciary included. The defeated candidates set up a constitutional objection, which the Supreme Court on being appealed to sustained. But that was the court that would go out. The court that would come in as a result of the election would doubtless hold otherwise, and the one was as competent to decide a question upon which its own existence depended as the other. When under such circumstances the defeated governor called upon the President for assistance in retaining his office, the President very properly declined to interpose, or to consider in any way the constitutional question involved. The party appealing for aid had contested the election before the people and been defeated, and he might well be refused extraordinary remedies when the appeal itself was a stultification of his own action.

THOMAS M. COOLEY.

ESSAY NINE.

SOME CHECKS AND BALANCES IN GOVERNMENT.

"IS there," said John Adams, "a constitution upon record more complicated with balances than ours? In the first place eighteen states and some territories are balanced against the national government. . . . In the second place, the house of representatives is balanced against the senate, and the senate against the house. In the third place, the executive authority is, in some degree, balanced against the legislature. In the fourth place, the judiciary power is balanced against the house, the senate, the executive power, and the state governments. In the fifth place, the senate is balanced against the president in all appointments to office, and in all treaties. . . . In the sixth place, the people hold in their own hands the balance against their own representatives, by biennial, which I wish had been annual, elections. In the seventh place, the legislatures of the several states are balanced against the senate by sextennial elections. In the eighth place, the electors are balanced against the people in the choice of the president. And here is a complication and refinement of balances which, for anything I recollect, is an invention of our own and peculiar to us."

This is a formidable enumeration of constitutional balances, but the venerable ex-president had discovered that there may be some which are extra constitutional. He was then in his seventy-ninth year, and there had been opportunity to learn something of government, or at least of those who manage governments, since he wrote so voluminously of the American constitutions, boasting of their checks and balances, so like those of Great Britain, and defying any one to point in history to "a single example where the laws were respected, and liberty, property, life, or character secure, without a balance in the constitution." He had found that there may be constitutions and balances of which the written law takes no notice, but which may possibly control the written law. "All these wheels within wheels, these *imperia* within *imperiis*, have not been sufficient to

satisfy the people. They have invented a balance to all balances, in their caucuses. We have congressional caucuses, state caucuses, county caucuses, city caucuses, district caucuses, town caucuses, parish caucuses, and Sunday caucuses at church doors; and in these aristocratical caucuses, *elections are decided!*"[1]

So formidable an array of balances ought, it would seem, to deter any one from an attempted usurpation of power, were it not the experience of the world that in governments the most secure protections too often prove futile. What, at this time, is the condition of all those checks and balances, which, in 1787, the writers of the *Federalist*, and those in sympathy with them, relied upon as constituting the sure defense, not less than the necessary condition, of liberty? What has become of them in Great Britain, where the monarch no longer ventures to withhold his assent to a law; and where the house of peers no longer dares to refuse assent to a bill which any strong public sentiment, represented in the other house, imperiously demands? Can it be said that either monarch, or house of peers, is any longer a considerable check—much less a balance—to a house of commons, whose sentiments control not legislation merely, but executive action also? And who will venture to assert that in this country the balances Mr. Adams enumerates have not been very seriously disturbed in recent times, or that—to speak of nothing further—the American senate has not been, gradually but surely, appropriating to itself some measure of the authority, not only of the lower house, but of the president, until, to a considerable extent, it has become the dominant power in the government, only in a less degree than has the popular branch of the legislature in England? If this is true, it is certainly a striking and very important fact, that while power in the monarchical country has been passing steadily, and by no means slowly, into the hands of the body most directly representing the people, and most sensitive to public opinion, in the republic, it has tended in the direction of the body farthest removed from the people, and which, by its constitution, the mode of election and term of office of its members, was intended to be less directly answerable to public sentiment than even the president himself.

There is little question as to where, at the present time, one must look, in Great Britain, for the effectual balance. It is certainly not to be found in any nice adjustment of authority, as between queen, lords, and commons, for no such adjustment exists. The balance of

[1] Letter to John Taylor in response to his "Inquiry."—*Works*, Vol. VI., p. 467.

parties is much more effectual, and is usually sufficiently close to render it necessary that the party in power shall be exceedingly circumspect in its action; and, above all, that it shall not venture rashly upon any measure of great importance. Where the effectual balances are to be found in this country is not very clear. The inquirer would be certain to find that Mr. Adams' caucuses are very active and very powerful, but whether he could trace their invention to the people, or demonstrate that, in any proper sense, they are caucuses of the people, is by no means so sure.

The purpose of the present paper is not to discuss the broad general subject of checks and balances in this, or any other, government, but to call attention to a few considerations only. These, in the main, affect the executive and the judiciary, rather than the legislature; and they will serve to show, perhaps, that neither of them can always, and under all circumstances, rely upon any very sure protection to its legitimate powers. It is one thing, unfortunately, to put intricate machinery in motion, and another, and quite a different, thing, to make it, under unforeseen occurrences, work out the intended results.

The assertion is often made that the power of the executive is greater, more active, and more pervading, in this country, than it is in Great Britain. Undoubtedly this is true; but it is also true that the power depends very largely upon the enormous political patronage. A great inroad was made upon this, for the benefit of the Senate, by the Tenure of Office Act, and while that act remains in force, the available authority of the president will depend on other circumstances than the written law. With a friendly congress, or a congress nearly balanced between the parties, his authority will still be powerful; but an overwhelming majority against him in congress may at any time reduce him to a condition little better than that of a ministerial agent, compelled to commission officers, the appointment of whom is, in effect, dictated by the senate, and to put in force the laws passed over his head. At best he can only bargain with the senate for a share in the offices, and the share allowed him will be likely to depend upon the strength of his party, and the hold he may be supposed to have upon the people. In a time of violent party passion and excitement, when the president would need protection most, he might find none at all, except such as might rest in the good sense and caution of his adversaries. The violent partisan may be ready enough to find a "high crime and misdemeanor" in any attempt to thwart the party purposes; and the president may pos-

sibly find that he holds his position on condition of strict obedience to party behests, and must not venture to interpose "checks" or "balances" to the will of the party as expressed in congress. This is undoubtedly to suppose a very extreme case, but it is for precisely such cases that there is most occasion to provide balances.

In any contest between congress, on the one hand, and the president, on the other, if the latter shall be found to need support or protection in his just authority as against the inroads of violent passion, or of cool, but reckless, party schemes, the judiciary can not render it. The judiciary is sometimes said to be the chief conservative power in the government, but it has no conservative authority for such a case. It may exercise a conservative influence by keeping on quietly and peaceably in deciding causes between man and man, and by setting the example of a careful observance of the constitution and of the laws; but that is all. Its utterances, even though legitimately expressed in actual legal controversies, on questions that might divide an excited congress and a powerless president, would be utterly futile for good, and might even tend to fan the flames of passion, and possibly result in bringing retributory legislation upon the court itself. Whatever may have been any one's theories, the truth, sufficiently manifest at this time, is, that the reliance of the president, in the exercise of what he believes to be his just powers, and in the performance of what appears to him to be his duty under the constitution, must be found, not in any balance which the judiciary can interpose, but in such a balance of parties as will enable him to have a voice in legislation, and as will protect him against a mere partisan impeachment and conviction.

The judiciary—from the very nature of its powers, and from its dependence upon the other departments, not only for the law that it is to administer and that shall govern in the administration, but also for the means of enforcing its own judgments—is, and must always be, less capable than the other departments, of protecting itself, either in its *personnel* or in its jurisdiction. In some cases, the provision made for protection is only such as assumes that legislation will always be wise, and that the electoral body will never be actuated by passion, or have unworthy ends in view. Such has been the case in some states where the judicial elections were annual, making the steady retention of public favor essential to the continuance of the judge in his position. Under such a system, the judge who cares to retain his position is much less independent than is either the chief magistrate, or the legislator who holds office by like tenure. A

member of either of the political departments is not confined to the administration of definite rules, which he should apply without fear or favor, but he assists in making rules, and he may study policy, consult the varying phases of public opinion and desire, and by a judicious trimming of sails, may sometimes recover himself when the squall seems at first to have capsized him. Besides, he is enabled to mingle with the people; he can appeal to them in person, or through the newspapers, in explanation or excuse of his course; and if he has ability and tact, it will be surprising if he does not succeed in inducing an offended constituency, as Henry Clay did once under like circumstances, to "pick the flint and try the trusted rifle once more." The judge has no such resources, even if he were disposed to make use of them. In securing and retaining the public esteem and support, his reliance, if he is a fit judge, must be upon his own integrity, his attention to his duties, and such force of reasoning as may appear in his written opinions. If these fail him, there would seem to be nothing else of which a judge could properly make use, or rely upon to sustain him.

The constitutional history of the United States, using the word now in its judicial, rather than its political sense, opens in Rhode Island, with the setting aside of a bench of judges, for venturing to declare the law when the popular passion demanded that it should be perverted. The period was one of general indebtedness and heavy taxation, both made more burdensome by general stagnation in business. The circumstances demanded "relief" for the people, and the available relief seemed to be an issue of paper money, by means of which public and private debts, alike, might be paid. The average legislator, who can levy taxes, create and fill offices, and then abolish them, impose restrictions on trade, even to the extent of destroying it—if he shall please to do so—is slow to believe that there is any law of political economy operating among those over whom he is set as a ruler, which he can not, or should not, compel to bend and conform to such enactments as the good of his constituents may demand, and as he may devise for their welfare. And if there be such laws, which his constituents have found to work oppressively, what more effectual device could be invented for thwarting them, than that of punishing such as may be obstinate enough to observe them?

Paper issues have often been based on nothing more substantial than faith and hope, but in this instance the ultimate reliance was upon fear. The issues were to be kept afloat by penal enactments,

under which every man who refused to take the paper money, at its face in gold, was to be arrested, summarily convicted, and punished. In some quarters there were persons who doubted the rightfulness of such laws, and for that reason, or, perhaps, because of the possible delays that might result, jury trial was denied to accused parties. In this denial lurked the danger to the judges. The colonial charter made jury trial a matter of right, and the judges, if they heeded their oaths, were compelled to hold that the privilege could not be taken away. And this, like honest men, they did. But the judges were got rid of, and the purpose of the paper issues was accomplished, to the extent of a substantial repudiation of the public debt, and of private debts also.

The moral deducible from these transactions is no different from that which may be drawn from many others, equally well remembered. They only demonstrate what needed no proof, that obedience to the law, purity of motive, and honesty in action, can not protect an officer whose integrity has been exhibited in a refusal to yield to an imperious popular clamor. It does not placate an angry people to assure them that a judge who has resisted their demands has obeyed the law: what they want, under such circumstances, is a judge whose facile principles will allow him to indicate a way by which the law may be evaded, rather than one who is disposed to heed the admonitions of conscience. The case mentioned is a striking, rather than an anomalous, one. It is not often that so bold a repudiation of the law, and of those chosen to administer it, occurs; but the instances are sufficient to prove that whenever circumstances favor the attempt, there will be no lack of interested parties ready to lead in making it. In several of the states, if the records were complete and truthful, there would be facts recorded of a like repudiation of faithful officers; and in some instances, with much less excuse than in that of the people of Rhode Island, impoverished and burdened as they were by the pressure of public and private debts.

The first occasion of note when the judiciary and the executive came in conflict, was on the accession to power of the Republican party under the lead of Mr. Jefferson. An examination of the facts will serve to show how helpless must be the judiciary, whenever the executive feels sufficiently strong with the legislature, to be secure in setting the courts at defiance. Two occurrences attract particular attention here: the setting aside of the circuit and district judges, who had been appointed and confirmed for life, near the close of Mr. Adams's administration, and the failure to obtain, from the supreme

court, a writ of mandamus to compel the Secretary of State to deliver commissions, which, though actually made out and sealed, had not been delivered when Mr. Adams retired from office.

By the repeal of the Judiciary Act, a large number of judges, appointed in the last days of the Adams administration, were deprived of their offices. There were no longer courts in which they might sit. The constitution itself provided that the judges should hold during good behavior, but though accused of no bad behavior, their tenure was terminated. There might be a question whether they were not still entitled to their salaries, but this would be all. The right to these was denied, and no attempt was made to collect them. It was on the occasion of this repeal that congress was first dazzled by the genius of John Randolph. "I am free to declare," he said, "that if the extent of this bill is to get rid of the judges, it is a perversion of your power to a base purpose: it is an unconstitutional act. If, on the contrary, it aims not at the displacing one set of men, from whom you differ in political opinion, with a view to introduce others, but for the general good, by abolishing useless offices, it is a constitutional act. The *quo animo* determines the nature of this act, as it determines the guilt or innocence of other acts." He compared it to an impeachment, and denied that it was admissible to draw arguments against the power from its capability of being put to flagitious uses by an unscrupulous majority. Every government presupposes a certain degree of honesty in its rulers.

Yes, and every government presupposes a certain degree of honesty in its people. It is a species of impeachment when a judge is assailed for his opinions upon being named for a reëlection. It is a species of impeachment when a concerted assault is made upon him in the papers for something he has said, or done, or left undone. Several able judges have been convicted and removed on such impeachments — convicted of not finding the law to be what their assailants desired. The question does not so much concern the tribunal of impeachment, as the probability of a just trial in it. It is this that concerns judges most; the probability of being treated fairly when called to an account. And on this point those who have planned and theorized have usually left out of view one important consideration: they have not taken into account the power of the caucus; not so much, perhaps, the power of the town or city caucus, as that of the legislature, which has sometimes displayed an ability to bring about a unanimity of praise or censure to which the inferior caucuses were totally inadequate. It would require a considerable

degree of boldness to say that the judiciary is safer in the hands of partisan majorities in the legislature, than in the hands of partisan majorities in a popular vote. It was the legislature which brought the Rhode Island judges to account, and New England can present other instances in which a party majority in the legislature has refused a reëlection to judges who have faithfully, honestly, and ably performed their duty. But this subject is aside from the constitutional power to abolish offices conferred in freehold. Upon that effective arguments have always been found in numbers, and the precedents, state and federal, favor the power.[1] When a man's right to appropriate what his neighbor possesses depends on the *quo animo*, the neighbor may as well surrender it without making difficulty.

The case of the attempt to compel the delivery of commissions to officers appointed by Mr. Adams presents some points which are now, and probably always will be, of interest. Marbury with others had been duly nominated, and confirmed by the senate, as a justice of the peace for the District of Columbia. Nothing but the formal commission was wanted to clothe him with official authority, and the delivery of this had been delayed. He applied for it to Mr. Madison, the secretary of state, but the delivery was refused. He then applied to the supreme court for the compulsory writ of mandamus. The supreme court, having for its mouthpiece Chief Justice Marshall, then just beginning to exhibit his remarkable powers in that tribunal, decided that it must deny the writ, because the issue of it would be the exercise of original jurisdiction in a case in which, under the constitution, the court could not be clothed with original jurisdiction.

When this conclusion was reached, the case was necessarily at an end. Under such circumstances, a court usually refrains from the expression of an opinion on the merits, because it can be nothing more than extra-judicial. Nevertheless the judges of the Federal supreme court have sometimes deemed it advisable to express important opinions in cases thus circumstanced. They did so in the case of Dred Scott, and they did so in this case of Marbury *versus* Madison. The reason in each instance has generally been assumed to have been the same—to influence the action of the political departments of the government by judicial opinions on questions of constitutional law. In neither instance was the purpose accomplished, nor would it be likely to be under any similar circumstances that might arise hereafter. Such opinions can only come as advice offered to

[1] Similar legislation had previously been had in Maryland and Virginia, and was afterwards had in several states; probably never without a protest against the right.

parties who have not requested it, and who will be more likely to resent the giving of it than voluntarily to follow it. The chief justice must have assumed the contrary when he prefaced his decision that the court had no jurisdiction to grant the relief with the unanimous opinion of the court that by the signing and sealing of the commission Mr. Marbury became legally entitled to the office, and "that having a legal right to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy."[1]

What was that remedy? It is certain that Mr. Marbury never found it, or, at least, that he never made it available. Mr. Madison disregarded the *obiter* opinion, and Mr. Jefferson treated it with contempt. "The federal judges," he said, "declared that commissions signed and sealed by the president were valid though not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed. It is in *posse* only, but not in *esse*, and I withheld delivery of the commissions."[2]

What would have been done had the court reached the conclusion that it might, in the exercise of its original jurisdiction, issue the writ of mandamus, is a question of more than mere curious interest. It involves, first, the probable action of the court, and second, the probable action of the secretary and the president. Would the court have ventured to issue the writ of mandamus to the head of a department in a case of this peculiar character, and to have attempted its enforcement? The responsibility, it must be admitted, would have been very serious. It is as certain as anything of the kind can well be, that Mr. Jefferson would have instructed his subordinate not to obey such a writ. He would have regarded the delivery of the commission as an executive act, in the performance of which the secretary would be his agent merely, and holding, as he always did, that the executive had a right to construe the constitution for himself, he would have declined to take the law from the supreme court, or from any other court. The chief justice, it is not improbable, knew this at the time, and he certainly had every reason to believe that in directing a refusal to obey the writ of mandamus, the president would be supported by the approval of congress.

The writ of mandamus is an exceedingly serviceable writ where mere ministerial duties are neglected, and is often employed to compel the performance of duty by inferior officers, or even by heads of

[1] Marbury *vs.* Madison, Cranch's Reports, 137; Flanders, Lives of the Chief Justices, 354.

[2] Letter to Judge Roane, Sept. 6, 1819; Works, Vol. VII., p. 135.

departments. But whether it may be issued to the executive himself, or to one of his subordinate agents in the performance of an executive duty, is the question which would have confronted the court in Marbury's case. The question has often arisen in the state courts, and sometimes the power has been exercised, and sometimes denied. Mr. Chase, when Governor of Ohio, submitted to the writ in several instances; but it is believed that in each case the governor only desired to obtain an authoritative exposition of some law under which duties had been devolved upon him, and did not care to examine the questions for the purposes of an independent opinion. Where the courts have examined with deliberation the question of their power, they have generally denied its existence.[1]

Is the executive above the laws? has been the query in these cases. Is not every man who is wronged entitled to a remedy, just as much when wronged by the executive as when wronged by an inferior officer or by an individual? Yes, doubtless, every man is entitled to his remedy, and the executive must be subservient to the laws. But every wrong can not be redressed by the courts. Some wrongs are political, and must be redressed, if at all, by the people themselves. Some wrongs can only be redressed by the legislature. A state wrongs her creditors when she refuses to pay the interest on her debts, but the courts can not help them. The forum of redress is the legislature, and if they apply there, and can obtain none, they are remediless. A court sometimes, through error or perverseness of judgment, turns a just cause out of court, and the plaintiff, though wronged, obtains no remedy. And yet neither legislature nor court is above the law. In the particular cases they are to administer the law, and they decide against the remedy applied for.

Now the governor of a state is an independent department of the government, as much as the legislature or the judiciary. He has his duties assigned to him by the constitution, and the departments to which duties of a different nature are delegated can not, by virtue of such delegation, interfere with them. Presumptively, whatever he does, as executive, will be rightly and lawfully done, and will deprive no one of a lawful right. If he denies the application of any private person, it is to be assumed it was because the applicant had no lawful right to have it granted. If he is an independent department, this presumption must apply in his favor, just as it must be in favor

[1] This subject was briefly referred to in an article published in the last volume of the INTERNATIONAL REVIEW, p. 57 et seq., but its importance seems to justify some further attention.

of the final action of a court. To subject him to the process of the court, would be to render him subordinate, just as a court would be made subordinate, if the executive should set aside its conclusion and direct a different judgment. The independence of a department is destroyed when another department may overrule its action. The latter is no longer a check or a balance, but has become a master.

Besides, who is to enforce a writ of mandamus against the executive? This is a pertinent question, at least, for mere advisory powers are not usually conferred in government, and are not likely to be respected when they are. A writ of mandamus can not deprive the executive of authority, or paralyze his powers. He will still be the chief conservator of peace of the state, with ministerial officers under him. He will be commander-in-chief of the military forces of the state. If disorder breaks out, the law contemplates that it shall be quelled under his orders, and if the process of one of the courts is resisted, it is the executive who is to be called upon for its enforcement. When, therefore, a court undertakes to subject him to its mandatory process, it is proceeding against the officer who is himself the representative of the force of the state, and who may make use of the peace officers, as well as of the military power of the state, with all presumptions of law in his favor. It is but too manifest that he has only to refuse obedience to such a writ, and it becomes ineffectual; or that, if the attempt is made to enforce it, the power to compel will be insignificant, as compared with the power to resist.

An assertion of a power in the courts, then, to issue coercive process against the executive, would be the assertion of a power every exercise of which would invite collision; and in every collision, the executive would come off triumphant. This must be true as a rule. An exception might exist when the popular voice happened to approve the judicial action, and was sufficiently pronounced to render it politic for the executive to listen to it. Undoubtedly a governor would consider with some care what a hostile legislative majority would be likely to do, before he would venture upon a collision. A conflict with the legislature might be a much more serious thing, to the executive, than a conflict with the judiciary. The legislature makes laws and adapts them to the circumstances; and the boundary between executive and legislative authority in the control of the army is not so clearly defined as to warrant the executive, under any circumstances, in trying extreme conclusions with the legislature. Besides, he would be in conflict with the body having the impeaching power, and this must lead him to pause.

All this does not prove that any officer or department is above the laws. The constitution supposes that all will do their duty. But it nevertheless provides for official crimes and misdemeanors, what is supposed to be, the adequate remedy of impeachment. The same remedy is provided for corresponding offenses, whether committed by judge or by governor. In this manner the constitution preserves the independence of the departments, and at the same time preserves, over all, the dominion of the law.

Some of the questions which have been touched upon have pointed application, at the present time, to a controversy which has arisen in the state of South Carolina between the executive on the one side, and two persons who assert their title by election to certain state judgeships, on the other. The constitution of the state provides that the election shall be made by the legislature, and it has been so made. But the constitution also provides that the governor "shall commission all officers of the state,"[1] and this, in the case of these persons, the governor refuses to do. The refusal is put on the ground of their dishonesty, profligacy, and notorious unfitness for the position.

This controversy is referred to, not for the purpose of considering how it should be decided or disposed of, but only to show that there may be occurrences in government for which no adequate provision can be made in advance, and when one department will exercise a power which was perhaps never intended to be conferred. Of course, if the governor is correct in asserting that one of the newly elected judges is a mere ignorant adventurer, and that both are notoriously dishonest, he is not to be censured if he employs all legitimate means to prevent their induction to office. He could not well do otherwise if he regards the good name of his state, and takes pride in her judicial annals, on which are inscribed the names of many very able jurists. But the question of the fitness of the candidate for an office is for the body which elects, and unfitness does not defeat an election regularly made. The questions that arise in this case seem to be, *first*, whether the rights of the claimants have been fixed by the election, and *second*, what remedy they may have to enforce their rights if they shall be found to have any. The first question seems to depend on whether the issue of a commission is necessary to complete the title to the office. Chief Justice Marshall held, in Marbury's case, that the title of the office was perfected when the commission was signed and sealed, and that the commission was only evidence

[1] Constitution of 1868, Art. III., § 17.

of the title which might also be made out by other evidence. But here no commission is either signed or sealed; there is only an election. There is indeed one distinction between this case and Marbury's: here, the body that elects has done all that was necessary to the complete expression of its will in the election: there, the officer having the power of appointment had withheld the final act which was to evidence his intent that the appointee should have the office. But whether this is a controlling circumstance will doubtless be made a question. It may be urged, with some force, that the constitution does not, usually, impose mere ministerial duties on the chief executive, and that the requirement that he shall commission officers, carries with it some presumption that, in his discretion, he may refuse.

But when a governor takes such a position, whether legally right or wrong in doing so, the noticeable fact is, that, so far as he is concerned, the parties are without any effective remedy. If the legislature sympathize with the claimants, they may possibly impeach him, but impeachment could not give them their office if he still retained his. Possibly, however, an efficient remedy might be in their own hands, consisting in their taking possession of the offices, at the proper time, on an assumption that the commissions were wholly unnecessary to their title. The difficulties that might be encountered in so doing will be alluded to further on.

In considering the position of the judiciary, it is worth while to bear in mind that its power may, sometimes, be very effectually paralyzed by the refusal of executive aid in enforcing its judgments. Illustrations in the history of the federal government are found in the Cherokee cases, arising in the state of Georgia. In those cases the judicial authorities of the state were enabled to set the federal supreme court at defiance. Obedience to its judgments could not be compelled without a resort to force, and force required the aid of the executive. Jackson is reported to have said: "John Marshall has made his decision; now let him enforce it." One man was hung, and others were sent to the penitentiary by the judgment of the state courts, for offenses committed in territory which the federal supreme court had decided was excluded from state jurisdiction by the treaties with the Indians.[1] One can readily understand what a

[1] Worcester *vs.* Georgia, 6 Peters' Reports, 515. Mr. Niles in his Register, Vol. 39–44, collects the various documents on this subject, and short accounts appear in Flanders' Lives of the Chief Justices, p. 430–437; Kennedy's Life of Wirt; Sargeant's Public Men and Events, Vol. I., p. 177, and many other books. In the Bench and Bar of Georgia, by S. F. Miller, Vol. I., Ch. VI., is an account of Judge Clayton, the state judge by whom the

farce it would have been to attempt the control of President Jackson by the employment of the writ of mandamus.

In Merryman's case, the futility of judicial attempts to control the action of the executive was also illustrated. This man was arrested by military orders in Maryland, on charges of treason, and was confined in Fort McHenry. Congress had not yet suspended the privilege of the habeas corpus, and on the petition of Merryman, Chief Justice Taney issued the writ to inquire into his detention. The officer having him in charge declined to produce him, alleging, as a reason, that he had been authorized by the president to suspend the habeas corpus for the public safety. The chief justice being of the opinion that the president could not confer any such power, directed an attachment to issue to bring the officer before the court to answer for his contempt in refusing to obey the writ. But the attachment was not served, and could not have been. The chief justice conceded this, and dismissed the case with the remark: "Under the circumstances I can barely say, to-day, I shall reduce to writing the reasons under which I have acted, and which have led me to the conclusions expressed in my opinion, and shall report them, with these proceedings, to the president of the United States, and call upon him to perform his constitutional duty to enforce the laws; in other words, to enforce the process of this court. This is all this court has now the power to do."[1] *Inter arma silent leges.* But this is all the court would have had the power to do, at any time, with a president inclined not to submit, and a congress sympathizing with him in his refusal.

That the judiciary has no power to control the political action of the executive, has twice been formally decided by the federal supreme court, in cases in which the reconstruction acts were called in question, and the endeavor was made to prevent their enforcement as unconstitutional. The decisions are sufficient to show, if it were not otherwise thoroughly demonstrated, that the judiciary is not always the final arbiter of constitutional questions; and as to some questions, from their nature, can not be. Some of the practical difficulties are stated by Chief Justice Chase in the case of Mississippi. "Suppose the bill filed and the injunction prayed for allowed. If

state decisions were rendered, and of his action in these cases. The persons sent to the penitentiary remained there until they solicited for a pardon, which was granted. A report of the Georgia legislature reviewing the cases appears in Niles' Register, Vol. 42, p. 58.

[1] Macpherson's History of the Rebellion, 154–158; Prof. Samuel Tyler's Life of Chief Justice Taney, Appendix.

the president refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the president complies with the order of the court, and refuses to execute the acts of congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the house of representatives impeach the president for such refusal? And in that case could this court interfere on behalf of the president, thus endangered by compliance with its mandates, and restrain, by injunction, the senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered, to the public world, of an attempt, by this court, to arrest proceedings in that court? These questions answer themselves."[1] In the case of Georgia, decided a little later, it was more distinctly declared that the judiciary can not protect even the vital rights of states against the encroachments of the political departments.[2] Indeed, whenever in any case of considerable importance it has been insisted that the action of the president was in excess of constitutional power, the courts have been powerless to act. Mr. Jefferson thought he had no authority to acquire foreign territory; but when he had acted, and the two houses of congress had approved his action, the judiciary could only recognize it. It was immaterial what the judges might think as to his right.

Returning now to the case of persons claiming to be chosen as judges, but not commissioned, it may be remarked, if seats are vacant upon the bench, that they may possibly meet with no impediment in occupying them. If, however, the executive refuses to recognize their right, the end, if we may judge by experience, can be easily foreseen. But this assumes that the executive shall be able to sustain himself with the legislature: if he fails in that, he must fail entirely.

A judge may be such, *de facto*, or *de jure*. If he comes in by color of authority, and actually exercises the judicial power with public acquiescence, his acts, in that capacity, can not be questioned collaterally. This seems to be almost a necessary rule in any good government; and it had the approval of Chief Justice Chase in cases of convictions before judges disqualified by the fourteenth amendment to the constitution. But the controlling consideration in such cases is the acquiescence referred to—the public recognition of official

[1] State of Mississippi *vs.* Johnson, 4 Wallace's Reports, 475, 500; Macpherson's History of Reconstruction, 239.

[2] State of Georgia *vs.* Stanton, 6 Wallace's Reports, 51.

character; and wherever that is wanting, the person must rely upon his actual title to the office. The question whether he has a right is, undoubtedly, a judicial question where no method of determining it, finally, has been prescribed by the constitution; and one asserting the right, is entitled, in such cases, to a judicial trial. But there may be judicial questions which, from the nature of the case, it is impossible to submit to a judicial tribunal.

The Federalists of New Hampshire, in 1813, following an example set by the Democrats of Massachusetts in 1811, proceeded to abolish and reorganize courts, in order to get rid of Democratic judges. Among those abolished was the supreme court, the judges of which denied the validity of the legislature, and persisted in retaining their places. For a time there were two sets of judges, each claiming lawful authority, and each assuming to act. Who should decide between them? Manifestly neither of them was competent to decide finally upon its own right, and in the absence of any tribunal empowered to adjudicate their claims, the controversy could only, at last, be settled by circumstances, and by public acquiescence in the pretensions of one of them. But when the right to an office is to be determined by circumstances, the most important must always be the recognition, by the political departments of the government, of one claimant, to the exclusion of the other. Usually, this must be conclusive, because it will determine the public acquiescence. If the executive were alone in his recognition, and both legislature and people were against him, it might be otherwise, as the royal judges in Massachusetts discovered a century ago; but cases can not often occur, now, where the executive can be so powerless. In New Hampshire there was no active interference by the governor, but the old judges soon abandoned the contest as hopeless. A fiery and impetuous governor would, perhaps, have sent a squad of men to break up their sittings, as was done in one state, under somewhat similar circumstances, after the breaking out of the late civil war; and while this violence would have been wholly unnecessary, it is difficult to discover any means of calling him to account. His action might have made the next election more heated, and possibly have led to the defeat of his party, but the political remedy would have been the only one by means of which he could have been reached. The assertion of one set of men that they constitute the judiciary of the state can not give them practical authority, as such, when the other departments refuse to recognize them. And this suggests a difficulty that may at some time be encountered, in some state, where

the whole bench of judges constituting its highest court is changed, at one time, by popular election. It is easy to suppose a case in which a contest might arise between the old bench, claiming to have been reëlected, and a new set of men, claiming to have been chosen to their places; and unless there were careful provision for a determination of the controversy by some political tribunal, it would almost certainly be determined by the recognition of one set of claimants by the executive, unless he should be confronted by a hostile legislature, who should recognize the contestants.

Something has been said in this paper regarding the dependence of an elective judiciary on the popular favor, but it was not meant to open any discussion regarding the proper method of selecting judges. That subject is a very broad, and very difficult, one, and the evils which the several methods have developed within the last few years, have not made it any less difficult. Some ugly facts have been brought out, which theories had not prepared us to anticipate. We have found it possible for politicians, as well as popular conventions, to insist upon the selection of men because of their unfitness, as well as because of their fitness. In this, all would agree. But on another point there is a popular misapprehension, namely, that the federal judiciary, after the appointment and commissioning of the judges, is practically independent of political control.

So far as the inferior federal courts are concerned, it was made manifest in Mr. Jefferson's time, that their organization was entirely within the reach and control of congress. A sudden and very great change in parties, at some presidential election, might, at any time, be followed by some very startling changes in that regard. Nor is the supreme court beyond the reach of congress. It is a constitutional court, it is true, and therefore can not be abolished, but congress may increase the judges indefinitely, and it is consequently never beyond the danger of having its action controlled by adding to its numbers. It is still more assailable in its jurisdiction.

In Marbury's case, Chief Justice Marshall asserted very positively that the petitioner not only had a right, but that he also had a remedy, in the law. The implication was that he might obtain this remedy in an inferior court. But it was never obtained, and the whole batch of abolished federal judges submitted to the action of congress while protesting its invalidity. Mr. Van Buren finds a reason for this acquiescence, in the power of congress, at any time, to strip the supreme court of a large portion of its jurisdiction; a power which he asserts the leading federalists of the day feared might

be exercised if the removed judges made any attempt to resist the will of congress.[1] We can not now know how much there is to this suggestion, but it is not many years since this very power was exercised by congress, lest the supreme court should pass upon a question on which its opinion, at the time, was not desired by that body; and the competency of the action was affirmed by the court, though it took away jurisdiction of a pending case.[2]

Enough has been said to show that the checks and balances which are to protect judicial independence, are not so perfectly arranged, and so complete in their provisions for probable cases, as may have been supposed. Sometimes, one or the other political department becomes, for the time being, supreme. Sometimes, the judiciary may be wronged in such a way that no redress will be open to it, except such political redress as a reasonable balance of parties may give hope for. And this renders it necessary that the judiciary should have a strong hold on the public favor and respect; for in this, after all, must be found the true basis for an independent judiciary.

Judicial independence does not consist, wholly, in a secure tenure of office. It is to be found, rather, in that combination of circumstances which neither compels the judge, nor invites him, to swerve, to the right hand nor to the left, when the path of his duty is plain before him. A secure tenure of office is one important circumstance, but it is not always the most important. Hope is often more powerful than fear; and a position longed for may influence, improperly, when the dread of losing the present position would be comparatively without influence. Whatever, for this, or any other, cause, tends to lessen the influence of the judiciary, is of very serious consequence, since the effect is to weaken a conservative power which is peculiarly liable, through no fault of its own, to have its just powers encroached upon, and sometimes resisted and nullified.

We might be tempted again to quote from John Adams, that to say it is extremely difficult to preserve a balance in government is no more than to say it is extremely difficult to preserve liberty. But it might be said, with some reason, that such remarks became trite half a century ago. We take the balance for granted, because we have provided for it by our constitutions. But it can not be unimportant to know that there are many cases in which the balance is liable to be thrown out of adjustment, and that some of these may be of very serious consequence in government, unless receiving wise and cautious treatment by the people, as well as by those set over them.

[1] Van Buren's Political Parties in the United States, 306–8.

[2] McCardle's Case, 7 Wallace, 506.

ESSAY TEN.

THE DIFFICULTIES OF REPUBLICANISM IN EUROPE.

I FEEL some diffidence in writing for an American periodical on a subject of which, from one point of view, American readers have an amount of practical knowledge that few Europeans can have. And I feel some diffidence too in taking up a subject which I can hardly treat except as in some sort a continuation of essays which I have myself written elsewhere, but which my present readers may never have seen. But the comparison of the different forms of government, especially of the different forms of executive, the balancing of the good and bad sides of each, is a study which has for many years occupied my thoughts; and the events of our own time are constantly supplying somewhat to add to or to modify what I have written about such matters, even a few years ago. More than ten years ago, in November 1864, I wrote in the "National Review," —which has since unhappily come to an end—an article on Presidential Government, afterwards reprinted in my first Series of Historical Essays. In that essay I compared the three main forms of executive, the hereditary and irresponsible king, with or without a responsible ministry; the single responsible president; and the executive council. And among the different varieties of these three which have arisen in various countries and various ages, I picked out three typical examples for special consideration, namely, the Constitutional Monarchy of England, the Presidency of the United States, and the Federal Council of Switzerland. Nine years later, in October 1873, I took up a subject in some respects kindred in the "Fortnightly Review," in an article headed "The Growth of Commonwealths." In this my object was to show that those States have been most stable and prosperous which, in casting off an old allegiance or in ordering their political constitution afresh, made no more change than was absolutely needful, and did not violently snap the tie between the old and the new state of things. Among many other instances, both in earlier and in later times, I mentioned the two confederations of Switzerland

and the United States, as examples of commonwealths whose success has been largely owing to the comparatively small amount of change which accompanied their acquisition of independence: and, from this point of view, I contrasted them with the ephemeral commonwealths which have from time to time sprung up in France—commonwealths which have been ephemeral largely because they have had no root in the past. But, since 1864, and even since 1873, some new pages of the history of the world have been written; events have happened which throw fresh light on the subjects which I took in hand at those several times. Events have happened on both sides of the ocean which have thrown new light on the comparison of the three chief forms of executive. And events have happened which have once more shown that to change the constitution of a country, whether from a monarchy to a commonwealth or from a commonwealth to a monarchy, is neither an easy task nor one that can be carried out in mere obedience to any ingenious theory. As the course of thought which these events call out would seem to have a special interest for citizens of the commonwealth whose constitution and history must always hold so great a place in all inquiries of this kind, I have gladly accepted the invitation to deal with some kindred points of political study in the pages of an American periodical. I do not know that the year and a half since 1873, that the ten years since 1864, need cause me to withdraw any thing which I said at either of those times. But the events of those ten years have added much to our stock of knowledge. Those events may require that I should modify some statements of fact which were true then but are less true now. Most of the changes which have happened have been simply the development of principles which were already at work, and have only given us new examples of old and unchanging laws.

First, as to the comparison between the three chief forms of executive, events have happened both in England and the United States which put the comparison between the forms of executive in the two countries in a somewhat different light. When I drew my comparison between the theory and practice of the executive in the two great English-speaking lands—between the King and his ministers in the United Kingdom and the President and his Cabinet in the United States—I pointed out that the real comparison lay, not between the President and the King, but between the President and the King's chief minister. That the real comparison lay here had not come into men's minds at the time when the American Federal Constitution was framed; indeed, in the days when George the Third was king, it

may be doubted whether the position would have been a true one. At all events it is certain that, just as Blackstone and De Lolme, when writing of the English Constitution, took no notice of that body, unknown to the law but so all-important in practice, which is now familiarly known as the *Government*, so no notice of it was taken by Hamilton and the other supporters of the American Constitution in the "Federalist." They made their comparison directly between the King and the President, and they showed that the legal restrictions on the will of the President were far greater than the legal restrictions on the will of the King. They did not point out, because in their day it was much less obvious, indeed much less true, than it is now, that the personal will of the English King counts for much less than the personal will of the American President. The legal powers of the King are indeed far greater than those of the President; but the President is far less fettered—though perhaps more fettered than the framers of the constitution meant him to be—in the exercise of those powers which the law gives him. Of the vast powers which the written law of England still vests in the King, some are now never exercised at all; the rest are exercised only under the advice of ministers who can hold office only so long as the House of Commons approves of them. If the House of Commons disapproves of their conduct, it can at any moment, by a process informal indeed, but practically most effectual, remove from office. But since 1864 some public steps have been taken in the development of the unwritten constitution of England. In England every thing goes by precedent, and since 1864 a most novel and important precedent has been set. It has long been known that the ministers of the Crown are, though not formally, yet practically, appointed and removed by the representatives of the people. It has been shown that there are circumstances in which they can be, in the same practical though informal way, appointed and removed by the people themselves. It is not too much to say that, in November, 1868, Mr. Gladstone was chosen Prime Minister by the electors of the United Kingdom in their polling booths. He was as truly chosen by the popular vote as any president or other elected magistrate could be. Indeed, I should doubt whether a President of the United States is often called to power so directly by the voice of the people as Mr. Gladstone was then. Mr. Gladstone was not the choice of any caucus or convention; nor was he, for he had never been at the head of the Government before, the conventional chief of the Liberal party. The people of the United Kingdom, as by a sudden inspiration, chose Mr.

Gladstone to be the practical ruler of the kingdom. The existing government of Mr. Disraeli acknowledged and bowed to their choice; they did not wait to face the newly chosen House of Commons, but resigned office before Parliament met, in deference to the unmistaken demand of the constituencies. The precedent thus set by Mr. Disraeli has since been followed by Mr. Gladstone. In February, 1874, the voice of the electors was as distinctly given against Mr. Gladstone as, in November, 1868, it had been given for him. Just as Mr. Disraeli had done, Mr. Gladstone did not wait for the meeting of Parliament, but resigned in deference to the voice of the constituencies. I ought to add that, in my own private opinion, I did not look upon the course taken by either minister as necessary or dignified. I held that a minister ought to receive his doom from the House of Commons only, and should not resign office on account of what is, after all, merely a surmise as to what a newly chosen House of Commons is likely to do. But the thing has been done; a course first adopted by Mr. Disraeli and then followed by Mr. Gladstone, will undoubtedly be looked on as a precedent, and will be followed by future ministers. It will become one of the principles of the unwritten constitution of England that the electors in their polling booths can appoint and remove a minister as well as the House of Commons in the palace of Westminster. In this way it is, I think, clear, that in certain cases, in every case of a dissolution of Parliament, the people of the United Kingdom have a more direct voice in the choice of him who is practically their chief magistrate, than the people of the United States have. In no case, save that of a legal impeachment for some legal crime, can an American president be removed before the end of the term of office for which he is chosen. An English prime minister, for however short a time he may have held office, may be removed by the House of Commons at any moment when Parliament is sitting, and he may be removed by the people themselves, if a dissolution of Parliament happen, either through the operation of the law or because the minister has himself chosen to run the risk.

In this way it is plain that since 1864 precedents have been set which have brought a new principle into the unwritten constitution of England. The direct action of the people, as distinguished from the action of the representatives in the House of Commons, is now acknowledged in a way in which it was not acknowledged before. And I think that I can also see a change in a smaller point which is not likely to have drawn to itself much of public attention. I need not explain that the body known as the Cabinet is absolutely unknown

to the written law of England. The law knows the members of such a cabinet as members of either House of Parliament; it knows them as privy-councillors, and as holders of the particular offices which they usually hold. In their collective character as a cabinet or "government," the law knows nothing about them. The law assumes that the sovereign does no act except by the advice of some one or other of his privy council, but, as far as the written law knows, any particular act is as likely to have been done by the advice of one privy-councillor as of another. In the view of the written law, any act done by the royal authority at this moment is as likely to have been suggested by Mr. Gladstone as by Mr. Disraeli. Both are alike privy-councillors; the fact that Mr. Gladstone holds no office, while Mr. Disraeli stands first among the commissioners for executing the office of Lord High Treasurer, makes all the difference in the eye of the unwritten constitution. It makes no difference in the eye of the written law. Now for a long time it has been usual for the sovereign, wherever he goes, to have always with him one of his secretaries of the state to countersign any documents which may have to be put forth in the royal name, and thereby to take the responsibility of such documents upon himself. Within the last few years a different rule has been introduced. The duty of constant attendance on the sovereign, which used to be taken by the secretaries of state in turn, is now taken by all the members of the cabinet in turn. Now, as I have just said, so far as the written law goes, a member of the cabinet, except in the actual discharge of some particular office, differs in nothing from another privy-councillor. The secretaries of state are by their office the natural persons to be in attendance on the sovereign. There seems no reason why such a duty should be laid on the President of the Board of Trade or the Chancellor of the Duchy of Lancaster. The change is clearly a step, though perhaps a small one, toward the more direct recognition of that singular body which is so great in the eye of the unwritten constitution, so utterly unknown in the eye of the written law.

Meanwhile, since I wrote in 1864, changes have happened on the American as well as on the European side of the ocean. I am shy of writing about matters of which my readers must have far more knowledge than myself. But I conceive that I am safe in saying that, while the events of the last ten years have clothed the President of the United States, as regards the several States, with a degree of power unthought of before the war, it has also been shown that, when President and Congress come into direct collision, the Congress is the

stronger power of the two. One of the points on which I insisted in comparing the three chief forms of executive government, was the relation between President and Congress, as compared with the relation between an English minister and an English House of Commons. The minister and the House of Commons have each of them means of getting rid of the other. The minister can dissolve Parliament; the House of Commons can pass a vote of censure on the minister, or reject some measure, which he deems equivalent to a vote of censure. The President cannot dissolve Congress, nor can Congress remove the President, except by the legal process of impeachment on a charge of some legal crime. In the Swiss Federal constitution, the Federal Council cannot dissolve the Assembly, neither can the Assembly remove the Federal Council. But under the provisions of the Swiss constitution, dissensions between the legislature and the executive are much less likely to happen than they are in the United States.

But nothing that has happened in England, nothing even that has happened in the United States, has been so fitted to set the political student thinking about the different forms of executive, as what has happened since 1864 in two of the great nations of continental Europe. When I wrote in 1864, the only example of presidential government which I saw any need to discuss was the Presidency of the United States. It was then the only example in the world of that form of government on a great scale. The other examples which I had occasion to speak of, in which a single magistrate is placed at the head of a republican state, were either things of the past, or were to be found in secondary commonwealths, like the particular States of the Swiss and American Confederations. The President of the United States stood out as the type of his class, the great example to be compared with the constitutional sovereign in England and with the Federal Council in Switzerland. To be sure, in 1864 one other example of presidential government, though a thing of the past, was not a thing of the remote past. Thirteen years only had then passed since the experience of France had shown how easily, under certain circumstances, the president of a commonwealth may change into its tyrant. Since then the events which have happened in the same land, and in a neighboring land, have largely increased our experience of commonwealths and presidents. Since 1864 two great European nations have declared themselves republics. The greater of the two calls itself a republic still. The questions arising out of these great changes are not only among the greatest practical questions of present European politics, but they also suggest much of

instructive thought for those with whom political constitutions are a subject of scientific study.

The events of the last few years, both in France and Spain, seem to me very strongly to illustrate the difficulties which must follow on the attempt to establish republican forms of government in the old monarchic States of Europe. I am not arguing as a zealot either for or against any particular form of government. I hold that, of all follies in political matters, the greatest is to set out with any cut-and-dried theory on behalf of any form of government, be that form what it may, as abstractedly the best in all times and places. The best form of government for any particular country will commonly be found to be that which the events of its history have given it. Governments which are the creatures of theory do not commonly last. Governments which have sprung out of the history of the nation commonly do last. The strongest argument on behalf of the constitutional kingship of England, of the personal presidency of America, of the executive council of Switzerland, is that each of them exists; that each of them is a form of government which has arisen out of the events and necessities of the country. England has had kings of some kind ever since she was one united nation; the circumstances of her history have given to her kingship the special character which it now bears. The United States, in abjuring their allegiance to a king, did not, any more than the old Roman Commonwealth, abolish the kingly power; they simply transferred it from an hereditary and irresponsible king, holding his office for life, to an elective and responsible magistrate holding his office for a term. Switzerland, which, in its federal character, had never known a personal head of any kind, when the old weak Diet was changed into a real federal government, naturally limited the executive power far more than it is limited either in England or in America. And those powers which it left to its executive, it no less naturally intrusted, neither to a king nor to a president, but to a council. Each of the three countries then has that form of government which the events of its history have made natural for it. In all the three the existing political system is founded, not on any abstract theory, but on the practical needs of the time and place. Each of the three then will do wisely in keeping the form of government which its history has given it. Each will act wisely in making any changes in detail which its circumstances may call for; but any one of the three would act very foolishly if it tried bodily to transplant the system of either of the other two countries. Happily there does not seem the least likelihood of either of the three attempt-

ing any such unwise change. On all these points matters are much the same as they were in 1864. It is to France and Spain that we have to look for new knowledge on these matters. And if the late revolutions of those countries supply us with examples which we may be inclined rather to avoid than to follow, the instruction which we may draw from those revolutions is none the less valuable.

The third French republic, as it arose in 1870, and as it took something like a regular shape in 1871, had, as I remarked in my article of 1873, one very great merit. It came of itself, and was not the result of any theory. The fall of the tyranny left the country without any executive government of any kind, because the tyranny had no root in the history of the nation. Had the same amount of national misfortune fallen either on England or on the United States as then fell upon France, cannot not believe that all the powers of government would have been wiped out in the way in which they were wiped out in France. Either in England or in America, if any one of the lawful powers of the state remained—King or Parliament, President or Congress—that one power would form a center round which the other powers might gather afresh. Some irregular acts might be done, as they have been done in trying times in both countries; but we cannot believe that there would be any clean sweep of every thing, that there would be any need for all political institutions to start afresh from the beginning. In France, where none of the institutions of moment, neither tyrant nor senate nor legislative body, had any root in the history of the country, the whole fabric fell with a crash, and every thing had to start afresh. And the first start was by no means a bad one. A legislature and an executive were needed, and a legislature and an executive came, as one might almost say, of themselves. The Bourdeaux Assembly and the Presidency of M. Thiers might seem rude and simple elements; but their rudeness and their simplicity were their merit. The immediate needs of the country were supplied by the creation of some legislature and some executive, and, had things been let alone, law or custom might have gradually settled the relations of the two powers to one another, and the details of a settled government might have grown up around them as they were wanted. But no party in France seems to have been satisfied with this simple course. The rudimentary commonwealth would seem to have been set up, not for all good citizens to join their efforts in working it into a more finished shape, but simply as a butt for every party to aim at and to plot against. Every party has had some scheme or other, hostile to the growth and improvement

of the institutions which the working of events had given to the country. One party sought for a more advanced republic; another sought for a king by divine right; another sought for a constitutional king of the modern type; while men have been found so degraded, so dead to every feeling of patriotism and self-respect, so lost alike to the sense of shame and the sense of right, as to seek to lay themselves and their country once more under the heel of a tyrant. We came to see the strange sight of a land where the government was in name a republic, where the word "Republic" appeared in every national document, on every coin and every stamp, but where for a man to be called a Republican was held to imply that he was disloyal to the existing republic. We came to see the strange sight of a republic whose chief magistrate was confessedly a stop-gap, a stalking-horse, in his best form an *Interrex*, holding a provisional power till it was agreed at the feet of which king or tyrant the nation should again throw itself. Men who know not what the words Republic or Democracy mean, men who shut their eyes to the teaching alike of the past and of the present, men to whom the institutions of Athens and Rome, of Uri and Ditmarsh, of our own forefathers in our own land, are alike utterly unknown, can glibly chatter in speeches and newspapers and books, and point to France and Spain as proving forever the utter weakness and worthlessness of republican institutions. Men who fancy that "Republic" necessarily means Democracy, and that "Democracy" necessarily means anarchy—men with whom the possession for all time is of less value than a modern newspaper, and who do not read their modern newspaper with care enough to know whether the Swiss Confederation has altered its constitution or whether it has any constitution at all—are ready enough to point a moral from facts which they do not understand, and sometimes, in their more festive moments, they seem unable so much as to propose the health of their own sovereign without indulging in ungenerous taunts on the institutions of other lands. Surely a deeper respect is shown to the institutions of England, a truer loyalty is shown to the sovereign whom the law puts at the head of those institutions, by looking at the constitution of England simply as that form of government which has grown out of the events of English history, as the form of government which reason therefore pronounces to be the best for England, while the same process of argument leads it to pronounce that other forms are equally the best for other lands. Still, late events in France and Spain do point their moral, though it is a very different moral from that which is drawn

from it by blind and obstinate ignorance. They do not prove that a republic, or any other form of government, is inherently good or inherently bad; but they do prove that a republic, like any other kind of government, is a hard thing to set up, when it has to be set up without any historical groundwork. And they prove moreover that in most of the modern attempts to set up republics, their founders have begun at the wrong end.

The question might be raised whether the governments which have at different times in later French history been called republics have really any right to that name. If the word republic or commonwealth is to have any practical meaning, it surely means something more than that the executive power is vested in some one who is neither a king nor a king's minister. I am far from denying the rights of aristocratic commonwealths, like those of Venice and Bern in past times, to bear the name of commonwealths. We condemn, and rightly, the confining of all political power to one order in the commonwealth; still it is plain that in a commonwealth of this kind all republican qualities may flourish in the highest degree within the privileged order. In France, on the other hand, it is hard to see that there is any room for the exercise of real republican qualities. Under all forms of government, whether republic, king, or tyrant, there is the same utter prostration before the government. As long as mayors and prefects openly and impudently meddle with elections, it really matters very little what is the nature of the power by whom mayors and prefects are appointed. A free state is free, not so much because its executive, or even because its legislature, takes a certain shape, as because its people are free to speak their minds and to act as they choose, within the limits of the law, in all matters public and private. According to English or American notions, that is the best form of government, whatever may be its name, that best secures these powers to its people. But governments which arbitrarily suppress newspapers, which keep cities and districts in a state of siege, which encourage their agents to tread freedom of election under foot, are not any the more worthy to be called commonwealths because their executive chiefs may be called presidents, and not kings or emperors. In England and Switzerland and America, national freedom has grown out of personal and local freedom. The national power has taken such shapes as have been found consistent with personal and local freedom. If some of us are beginning to think that, in England at least, a little more centralization would not be amiss, if some of the theories of local inde-

pendence are beginning to seem a little worn out, it is simply because the nation at large has won so much direct power over the national government, that centralization no longer looks so dangerous as it once did. A man who trudges through muddy roads which the local board neglects to repair, begins to wish that a government inspector might be sent to make the local board do its duty. In France it is all the other way. Whatever may be the form of the executive government, its powers are exactly the same, its way of acting is exactly the same. A large part of the French people have lost the habit of doing any thing for themselves; they expect the government to do every thing for them. People in this state of mind cannot have any real republican feelings. They can have nothing of that spirit of independence which exists in truly free states, whatever may be their form of executive, which is common to England, America, Switzerland, and Norway. If France ever wishes to have a real republic, it must begin in quite another way from any in which it ever has begun. That form of executive, that form of legislature, will be the best which will most let the people alone, and which will do most to encourage them in habitually acting and thinking for themselves. The first step toward a real commonwealth will be, not to debate about this or that form of government, but to keep the government, whatever may be its form, within its proper range.

It is then not a little unreasonable to turn the ill success of governments which have lacked the simplest groundwork of republican character, into an argument against republican government in the abstract. But the fact that men think that they are founding republics, while they seem to have no notion of what is the very essence of a republic, shows how difficult the task is to set up republics in the present condition of Europe. That there is one successful commonwealth in Europe, people who declaim against republicanism always seem to forget; the causes which have made it successful, they would doubtless be unable to understand. The federal commonwealth of Switzerland has been successful because it was not made but grew. The various attempts at republics in France have been unsuccessful, because they did not grow but were made. And the fact that the Swiss commonwealth has, while the French commonwealth has not, the groundwork of really free local institutions, has a great deal to do with the fact that the one has grown and the other has been made. In France since 1789, the whole comes before the parts: departments, arrondissements, communes, are administrative divisions of the one whole called France. In Switzerland it is just the other

way. The parts come before the whole: the smaller units are not divisions of the whole, but the whole is made up by the aggregation of the smaller units. The confederation is a collection of cantons; each canton is a collection of *communes* or *gemeinden*. And each stage, *gemeinde*, canton, confederation, is alike self-acting within its own range. Here then there is every opportunity for the real republican spirit to grow and prosper. The national institutions are republican, because the local institutions are republican. None but a republican form of executive could possibly suit a people whose whole daily life is republican. In Switzerland the whole thing hangs together; in France, all that has been ever tried has been to set a republican head on a body which is not republican. Switzerland has the immeasurable advantage over France, that her institutions rest on an ancient and immemorial groundwork, that whatever is new in them has grown naturally and consistently out of the old. In this way many of her cantons have changed from oligarchies to democracies, many have risen from the rank of subjects to the rank of confederates, without ever utterly breaking with the past. France has broken with the past, and on her has therefore fallen the actual work of reconstruction. To reconstruct is far harder than to preserve, to develop, to improve. Still, when a nation is so unlucky as to be driven to reconstruction, there is a right and a wrong way of beginning the work. Switzerland has good local institutions ready made; France has still to make them. To found such institutions now will be a hard task; still the attempt to found them will be, if not more successful, at least more deserving of success, than the attempt to build up a republican superstructure where there is no republican foundation.

It may sound like a truism, if I say that the chief difficulty in the way of founding republics in France or Spain is the fact that there have been kings of France and Spain. What I mean will be plainer when I say, by way of contrast, that there never was a king of Switzerland or of the United States. Both those countries have been subject to kings; but there were never was a king of either of those countries. What I mean here to insist on is, in fact, the same as the argument of my article of 1873. This was that those commonwealths were most successful where the nation and the commonwealth grew up together, and where the commonwealth arose by certain parts of a greater dominion gradually separating from the center. In such a case there need be no violent break. The authority of the central power gradually dies out or is thrown off; the colony, the district or the city, gradually becomes a sovereign commonwealth; its magis-

trates and assemblies gradually change from the magistrates and assemblies of a municipality into the magistrates and assemblies of a sovereign State. This was the way in which the two great federal commonwealths of Europe and America grew up. I say grew up, because the process by which the United States separated from Great Britain, and the process by which the Swiss cantons separated from the Empire, though at first sight they seem very unlike one another, are essentially the same. The difference is that a process which took some centuries in the European case was got through in a few years in the American case. In America the royal authority was thrown off; in Switzerland it died out. But in both cases the process of separation was gradual, though it was far more speedy in one than in the other. In both cases there was an unbroken continuity between the States in their dependent and in their independent character. All that was needed was to frame terms of federal union for the States that were to enter into the federal relation. And here again the process has been gradual. Step by step, very lax terms of union have been exchanged for much closer terms. The *Staatenbund* has become a *Bundesstaat*. In this state of things there is no national life, there are no national memories, apart from the commonwealth; the institutions of the commonwealth grow up bit by bit along with the growth of the nation itself. This is a state of things wholly different from the case when an already existing nation, with definite boundaries on the map, and with long national memories, most of them perhaps identified with kingship, gets rid of its king and tries to set up some other form of executive. The commonwealth which comes in as a violent break in the history of an old State has by no means such good prospects as the commonwealth which grows up along with the growth of a new State. The experience of England, France, and Spain shows that, where kingship has been exchanged for some other form of government, it is possible not only to set up some other form of monarchy, but to restore the old kingship in the old house. It is possible to do so, because the old house is probably still in being, and because the old kingship still lives in men's memories. There is a definite something to fall back upon, something which has been and which may be again. There is therefore a temptation to restore kingship; a party in the State may very likely wish for it, and the accomplishment of their purpose need not make any change in the relation of the State toward other nations. Charles the Second, Lewis the Eighteenth, Alfonso the Twelfth, have all been restored; some day perhaps Henry the Fifth, or—grievous as is the thought—Napoleon the

Fourth, may be restored also. Charles, Lewis, Alfonso, have been restored because there was something to restore, and because their restoration did not necessarily affect the national position. England, France, and Spain are equally England, France, and Spain, whatever may be the form of government in each country. But this kind of change could not take place in Switzerland or in the United States. We may conceive some Cæsar or Buonaparte setting up a tyranny in either country; we cannot conceive the restoration of a lawful national kingship in either country, because there is no lawful national kingship to restore. The kingship to which they were once subject can not be restored without doing something much more serious than any change in the form of government. It can not be restored without the utter surrender of the national life. The sovereigns of Great Britain and Germany* are now, as regards the American and Swiss Confederations, simply foreign potentates. To bring them in again would be something very different from bringing in Charles, Alfonso, or even Henry. That is to say, the lasting establishment of a commonwealth in France or Spain is made a much harder task by the fact that there have been kings in France and Spain.

A commonwealth then which steps into the place of a monarchy in an already existing nation, has in any case a harder task before it than a commonwealth which is born along with the nation, and grows up along with it. But the task becomes harder still when all parties seem agreed in one point only, not to give the new commonwealth a fair chance. Till quite lately the main question in France seemed to be what kind of monarchy should take the place of the commonwealth. But one main question still seems to be how the commonwealth can be made most like a monarchy. Till the voting of the last constitution, the republic seemed to live only because the partisans of the two kinds of kingship and the baser votaries of tyranny each hoped that by keeping on the *interregnum* somewhat longer, they might have a better chance of in the end setting up their own kind of monarchy. Even now the great object seems to be to make the *Interrex* as much like a king as may be. It is curious to see how, in the constitutional proposals which have been passed or rejected since the fall of the Tyranny, ideas which are in place only in a monarchy have hung

* To avoid misconceptions I may say that, in my view, the modern German Empire, though in no sense a restoration of the Holy Roman Empire, is a real restoration of the ancient German Kingdom. The Empire of William of Hohenzollern fairly represents the German kingship from which the Thirteen Ancient Cantons gradually split off.

about every scheme. From the very beginning we heard of "ministers," and all that has happened since, shows that the theory of a ministry, a theory quite in its place in a constitutional monarchy, but quite out of place in a republic, has never been got rid of. The theory of a constitutional monarchy is that the existence of an hereditary king at once gives the state a greater stability, and provides for the more easy change of the actual governing power. The king, not chosen for his fitness to rule, but accepted through the accident of birth, must reign, but not govern. The real governing power must be men who act in his name, but who must resign their power at the implied bidding of the representatives of the people, or of the people themselves. In a commonwealth there is no place for this artificial system; there is no need for it, no meaning in it. In Switzerland, where the executive power is in the hands of a council, there is of course no room for a ministry. The council is at once king or president and ministry. The Federal councillors divide among themselves the chief departments of the state, but this is purely for convenience, every important act must be the act of the council as a body. This, to my mind, is the most perfect type of republican government; but, even where there is a personal president, I can see no room for a ministry in the sense which that word bears in a monarchy. The ministers, in a constitutional monarchy, govern in the name of a king whose birth entitles him to reign, but who may have no qualifications to govern. But, while the king is meant to reign without governing, the president is surely meant to govern without reigning. It is to be supposed that he is chosen on account of his capacity for government, and there can therefore be no need to appoint others to govern in his name. The only reason for making this or that man consul, president, or chief magistrate under any other title, is that he is held to be a fit person to discharge, according to his own discretion, those powers with which the constitution clothes the chief magistrate. Ministers of a certain kind he must have; he can not do the whole work of government with his own hands. But surely the nature of the case implies that such ministers will be strictly his own ministers, responsible to him, responsible doubtless to the law, responsible to the Assembly as the great inquest of the nation, but not responsible to the Assembly in that peculiar conventional sense in which an English ministry is said to be responsible to the House of Commons. Accordingly the constitution of the United States knows nothing of any ministry. The President is intrusted with certain powers to be used at his own discretion within the limits of the law. If he breaks

the law, means are provided for punishing him. The constitution assumes the existence of "principal officers in each of the executive departments;" but these are simply persons whose opinion the President may require in writing, but whose opinion the constitution in no way binds him to follow, or even to ask. That nothing approaching to a ministry in the English or French sense was designed, is plain from the article which forbids any person holding any office under the United States to be a member of either House of Congress. This restriction makes an utter difference between the two systems; for it is of the essence of the existence of a ministry in England, or in any other constitutional kingdom, that the ministers should be members of one or other House of Parliament. The ministers of a president are in truth more like the ministers of an absolute king than those of a constitutional king. They are his counsellors, but not his masters; they are to obey him, not he to obey them. Now it is well-known that, in the United States, a body called the Ministry or the Cabinet has grown into an importance which the founders of the constitution never dreamed of; but it still remains essentially different from an English ministry. This is shown in two points. An English king is personally irresponsible; his ministers take all the responsibility, legal and conventional, of all the acts which are done in his name. As the sovereign is beyond legal responsibility, he is held to be also beyond the reach of praise or blame for any political act. But, though American cabinets have grown into something which Washington and Hamilton never designed, they have not grown to that height that they can shelter the President either from praise or blame or from legal impeachment. And the old restriction which shuts out the President's advisers from Congress still remains; and, as long as it remains, the position of an English and of an American ministry will be wholly different. To speak my own mind, the Swiss system is better, more truly republican, more likely to promote a good understanding between the legislature and the executive, than the American. But the American system answers all the essential requirements of a republican constitution. However the cabinet may have grown, it has grown in a conventional and extra-constitutional manner; whether we think the exclusion of the President's ministers from Congress wise or not, there is nothing either in the constitution or in actual practice to put the ministers of the President in the same position as the ministers of the King.

By a late vote of her Assembly, France has now a republican constitution. I at least hope that that republican constitution may

live and prosper. But what are its chances? Let us look back at the various schemes which have been proposed from February, 1871, onwards. The notion of a ministry, a ministry in the English sense, except so far as it is to be something known to the law, begins with the beginning of the new republic, and has grown with what we may call its backward growth. M. Thiers was no *Interrex*, but a real president, a man whom the nation put at its head because he was the best man for its needs. No commission could be more honorable; but the brief decree which first appointed him took a strange form. It defined nothing as to his powers, nothing as to the duration of his office, nothing as to his relations to the Assembly. Under the exigency of the moment all decision was put off as to these points, points which make the difference between one constitution and another, and some decision about which is essential to any constitution at all. Still, even at such a moment, the decree found time to take for granted that the President would have ministers, and to settle something about his relation toward them. It was decreed that M. Thiers, as "chief of the executive powers of the French Republic, shall exercise his functions under the authority of the National Assembly, with the assistance of the ministers whom he shall have chosen, and over whom he shall preside." One might have thought that it was of more importance to fix some term for the political existence both of the Legislature and of the executive chief, than to settle the way in which the executive chief should consult his ministers, whether by presiding over them or in any other fashion. Nothing can show more clearly that, in the minds of those who drew up this decree, the monarchic conception of a ministry was still the only possible thing. Nothing can show more clearly how far they were from any idea of a real republican executive, according to either the Swiss or the American type, than this strange clinging to ideas fitted only to a different kind of government. Next comes the Rivet Law of August, 1871. Here we get something which is meant to be more definite, but which is really vaguer than the few words of the earlier decree. Now we are told that the President of the republic, "after having informed the President of the National Assembly of his intention, names and dismisses the ministers." Then it is further decreed that "the council of ministers and ministers are responsible to the Assembly;" that "every one of the acts of the President of the Republic must be countersigned by a minister;" and lastly, that "the President of the Republic is responsible to the Assembly." Now, whether the acts of the President are countersigned by a minister is a formality of no essential importance.

There is no reason on earth why they should not be so countersigned, just as most of the acts of a private man require the signature of a witness. In Switzerland the acts of the Federal Council are signed both by the President of the Confederation * and by a ministerial officer, the Chancellor; and no doubt, in all cases, two signatures are safer than one. But such a matter would hardly have seemed worthy of a place in a solemn constitutional decree, were it not that it shows how strong the traditions of monarchy were in the minds of those who framed the decree. In a constitutional monarchy it is absolutely necessary that every act of the sovereign should be countersigned by a minister, because the minister thus takes on himself the responsibility of the act of the irresponsible king. If there is any thing illegal in the act, the law, which can not punish the king, will punish the minister. If the act is no way illegal, but is in the eyes of Parliament conventionally unconstitutional, or even simply inexpedient, the king can not be made the subject of a parliamentary censure, but the minister may. But all this is utterly inapplicable to a republican president, to a president who is expressly declared, as his ministers are also declared, to be responsible to the Assembly. Then in what sense is the President, in what sense are his ministers, responsible to the Assembly? Does it mean in a legal, or only in a conventional sense? Does it mean that, if they commit any crime, the Assembly, and no meaner tribunal, is to be the court to try them? Or does it merely mean that, if the Assembly dislikes their policy, they are to resign? The former is a kind of responsibility which may be defined beforehand; the latter can not. In England we know practically what is meant by the parliamentary responsibility of ministers; but it is not defined by law; the phrase is purely conventional; it has no legal meaning whatever. There are cases in which a minister, in the face of an adverse vote of the House of Commons, is clearly bound to resign; there are cases in which he may fairly dissolve Parliament; there are cases in which he may acquiesce in defeat. But no one can define such cases beforehand; till the case happens, no one can say which course a minister ought to follow. Therefore the parliamentary responsibility of ministers, as distinguished from their legal responsibility, must remain matter of usage and can not be made matter of law. Neither in the law of England nor in the constitution

* It must be remembered that, though the *Bundespräsident*, or President of the Confederation, bears a title so like that of the American President, his position is wholly different. He has no independent power, but is simply chairman of the Federal Council, with the usual powers of a chairman.

of the United States can any phrase like "responsibility of ministers" be found. We read, indeed, "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Here are the words of common sense; a legal trial and a legal punishment are prescribed for a legal crime. But chatter about a President responsible to the Assembly, and ministers responsible to the Assembly, without defining what responsibility means—chatter too so wholly childish as that about the President's acts being countersigned by a minister—all this simply shows the confusion of mind natural to people who are trying—or not trying—to set up a republic, but who, in so doing, can not keep clear of traditions and phrases which have no meaning except in a constitutional kingdom.

When a statesman is set aside to make room for a marshal, things are not likely to mend. The present ruler of France came in, as we all know, as a mere *Interrex*, a stop-gap, till it could be settled in favor of which among the rival pretenders the commonwealth was to be overthrown. Thiers, in a moment of real public need, was chosen that he might really govern; Marshal MacMahon, Duke of Magenta, and the rest of his titles, was chosen in a mad freak, that he might reign for seven years, and might so let down the commonwealth easily, into the jaws of some one who might reign more lastingly. During his *Interregnum* the Assembly for a long while steadily refused to pass any constitutional laws whatever. Yet ever and anon we heard of a ministerial crisis—of a change of ministers, of ministers resigning before a parliamentary defeat, of every thing, in short, which is in its place in England or Belgium, but which is impossible in Switzerland or America. Now at last France has a constitution, a constitution voted as a protest against at least one possible way of ending the *interregnum*, a protest against the restoration of the tyranny. Its provisions are well worth studying. The form given to the Senate, like other attempts to form a second chamber, a senate, or whatever it is to be called, calls for hardly more than a passing word. I have often had occasion to point out, when discussing matters of this kind, that the question of a second chamber is wholly different in a federal state and in a state which is not federal. In a federal state, a body like the American Senate and the Swiss *Ständerath* is absolutely necessary, if both the elements of the Federal body, the united nation, and the separate states, are to be fairly represented. And the American constitution, in this wiser than the Swiss, has strengthened the Senate by giving it other special powers, which make it one of

the most important elements in the commonwealth. In a commonwealth which is not federal, there is no such absolute need of a second chamber. It does not in the same way represent any distinct element in the state; only there is a general, and by no means an unfounded, belief that two legislative chambers do the work of legislation better than one. It is purely owing to the accidents of English history that England has a parliament of two houses, instead of three, as in France, or four, as in Sweden. But of this accident has arisen that bi-cameral system which many other nations have imitated, and which, wherever the state is federal, has been imitated with good reason and with good success. The constitution of the English House of Lords is, like every thing else in England, the result of a series of accidents. No one would, no one could, set up such a body for the first time as something new; but the House of Lords has the great merit of existing; and, as it exists, as it does its work much less badly than might have been looked for, though there are good reasons for modifying its constitution, there are no good reasons for destroying it. But a second chamber which has not an historical groundwork like the English House of Lords, which is not absolutely necessary to represent one element in the state, like the American Assembly and the Swiss *Ständerath*, is a mere creation of theory, a mere ingenious device, which may do very well in fair weather, but which can not stand the brunt of a storm. It has no such root in national needs and national feelings as either the executive or the popular branch of the legislature, and in any time of change it is the very first thing to give way. The form of Senate is a question of infinitely less importance than the form of executive, and the question where the power of dissolving the Assembly is to be vested.

By the present constitution it is decreed, as it was proposed by the Commission of Thirty, in July, 1874, that "the President is only responsible in the case of high treason," and that "the ministers are responsible as a body before the chambers for the general policy of the government, and individually for their personal actions." Now what does this mean? We are again driven to ask what kind of responsibility is meant. What is really to be done to the President who is guilty of high treason—supposing, by the way, that we are quite certain what high treason is? Is he to be, like an American president in the like case, impeached by one House and tried by the other, and if found guilty, condemned to a certain definite punishment ordained by the law? Or is all that is meant some vaguer kind of parliamentary censure, which it is hoped may drive him to resign? What if the

President commits some crime, public or private, other than high treason? The American constitution specially provides for the case of a President guilty of bribery. When it is declared that the President is responsible for high treason only, it is implied that he is irresponsible in all other cases. Does this mean that, if the President commits any ordinary private crime, he can not be tried in the court which has jurisdiction in case of such crime? This is a point which ought to be made clear, because, when an English king is said to be irresponsible, it means that in his own person he really is irresponsible; his command is no excuse for an illegal action on the part of another, but there is no way of punishing an illegal action done by the king with his own hand. Then what is meant by the council of ministers being responsible for the general policy of the government, and individually for their personal actions? Again we ask, what kind of responsibility is meant? The responsibility of a council of ministers, as a body, for the general policy of a government, sounds like a purely parliamentary responsibility; a responsibility enforced by the Assembly's vote of censure, and by nothing worse. But the responsibility of each particular man for his personal action sounds like that kind of responsibility which can be enforced in ordinary courts of law, or in Parliament by way of impeachment. The whole of this proposed legislation shows itself to be the work of men who, in professing to draw up a republican constitution, are unable to grasp in any practical way the essential differences between a republic and a monarchy.

Again, in the new constitution, as in several earlier proposals, we find provisions for the dissolution of the Assembly. The President may dissolve, with the consent of the Senate. Now, undoubtedly nothing is more needful in the present state of France than the dissolution of the present Assembly and the election of a new one. When the present Assembly was chosen, in the moment of the greatest national danger, no particular term was fixed for its duration, nor was any power of dissolution vested anywhere. There must therefore be one dissolution, but there need never be another. A moment's thought will show that the power of dissolving Parliament is an essentially kingly power, for which there is no place in a republic. The theory of the king's power to dissolve Parliament is that it is the king's Parliament, summoned by his writ; a body which he has called into being, and to whose being he can therefore put an end. This is, of course, a mere lawyer's view, which a knowledge of the real history of the national assemblies of England at once puts to flight. In the

earliest forms of the English constitution there could be no dissolution in the modern sense. The whole theory of dissolution goes on the notion of the royal power being supreme in the state, of its being the source from which all the other powers of the state flow. But no republican theory acknowledges any such supremacy in the chief magistrate; no one in America or Switzerland looks on the President or the Federal Council as the original source of all the powers of the state. Therefore neither the American nor the Swiss constitution vests any power of dissolution anywhere. The Assembly is chosen for a definite time; when that time is up, it dissolves by the operation of the law; before that time is up, no power can lawfully dissolve it. That is to say, the American and the Swiss constitutions are both of them honest constitutions, republican constitutions framed with good sense and in good faith. But either good sense or good faith is lacking in a constitution which fixes no term for the regular duration of the Assembly, but which gives the President, in conjunction with some shadowy Senate, the right of dissolving the Assembly. That is to say, there is a proposed constitution, nominally republican, in which the chief magistrate, if he can get the Senate on his side, may at any moment get rid of a patriotic assembly, while he may keep on a subservient one at his good pleasure. Here is a commonwealth, not only organized after the pattern of kingship, but which seems to have chosen the reign of Charles the Second as the model of kingship. Then how is the power of dissolution to be kept in harmony with the proposed responsibility of the President and his ministers? Can a President, charged by the Assembly with high treason, escape from trial by dissolving the Assembly? Can a council of ministers, responsible to the Assembly for the general policy of the government recommend a dissolution as a means of escaping from a threatened censure of the Assembly? No doubt the necessary concurrence of the Senate will be some check, but we must remark that the President and the Chamber of Deputies are essentially strong powers, while the Senate is something essentially weak. Such are the absurdities into which men are driven when they try to set up a commonwealth without being able to clear their minds of ideas which belong wholly to monarchies. In no true republic is either the chief magistrate intrusted with the power of dissolving the Assembly, or one branch of the Assembly. Such a power is given to the French President.

That shows either how little wish there is in the French Assembly to form a real republic, or else how little knowledge there is of the right way to set about forming one. It does indeed seem to be

a hard task for minds used to monarchy to take in the true republican idea. Men can not get rid of the notion of the personal ruler. If they can not have a king, they will have a president, and they will make their president as much like a king as they can. When men, even in England, talk either seriously or sportively on the subject of republican government, they seem to assume as a matter of course, that the one alternative of a king must be a president. Here, I believe, is one great danger, one great difficulty, in the way of setting up any real or lasting republics in countries which have once been governed by kings. The chief thing that is needed is to get rid of the notion of the necessity of a personal chief. I am not arguing against presidential government. I have said over and over again that the President is one possible form of executive, a form which has its own advantages and disadvantages, to be balanced against the advantages and disadvantages of other forms. In the United States it has the greatest of all arguments in its favor—it exists. And in the United States presidential government does not carry with it any of the dangers which it certainly does carry with it in Europe. No American president can be the warming-pan of a coming king; it is hardly more likely that he should find the means of setting up a tyranny in his own person. In France or Spain either form of revolution may happen, because both have happened. But it is the form of the executive, the vesting the headship of the state in a single man, which makes both these forms of revolution so easy. And in France, at least, they are again made more easy by the personal form given to the local administration. Where there are prefects below, why should there not be a king or a tyrant above? The personal headship again opens a wide field to the baser instincts of mankind. For those whose minds can not take in the highest of man's thoughts, for those on whose ears the great names of Law and Commonwealth—*νόμος* and *πόλις*—fall as sounds without meaning, the personal head supplies something to bow down to, something to cringe before, something in the sun of whose presence the would-be courtier may find the means feebly to bask. To such men an assembly or a senate is nothing; a president is something; a king is something better; a tyrant is best of all. And so we have seen men striving to bring back to rule them a lad of whom personally nothing either good or evil can be known, but whose one qualification, whose one recommendation, is the infamy of his descent. Honest men in search of a ruler would rather go out into the highways and hedges and take the first man whom they met. The first man whom they met would at least not

be a Buonaparte. He would, at least, not belong to that class which the honest instincts of old Greece looked on as the most loathsome form of man's nature. He would, at least, not be a tyrant, offspring of tyrants—*τύραννος ἐκ τυράννων πεφυκώς*.

And yet the constitution-makers of France need not go far afield to find those who can show them a more excellent way. Close on one of their own frontiers is the still abiding home of that ancient spirit which taught Athens at once to drive out her oligarchs and to respect the engagement which those oligarchs had made—of the spirit which taught Florence to bear up in the late crisis of her fate against the united powers of Pope and Cæsar. The Everlasting League—may that ancient epithet have been given to it in a prophetic spirit—still lives on to shame the novel and momentary devices of the kingdoms and commonwealths which rise and fall around it. There, in the home and birth-place of European freedom—in the land where the immemorial liberties of our common race still live on as they were painted by Tacitus—there is no fear of men casting aside every principle of republican life to throw themselves at the feet of a personal ruler. The Confederation of Switzerland may in some dark day be overthrown by foreign invasion; it may on some almost darker day be split asunder by religious dissensions. But there is no king waiting at its gates to be brought back to a vacant throne; there is no magistrate clothed with those dangerous powers which might tempt him to overleap the narrow gap which sometimes separates the president from the tyrant. In a spirit of the highest wisdom, Switzerland refuses to trust her executive power to any single man; it places it in the safer hands of a Council of Seven. Around her Federal Council no rag of kingly purple can hang. There is nothing about her seven chiefs to invite the homage of those whose chief object it is to find something to abase themselves before. The Federal Council is never born, it never dies, it never marries, it never falls sick and recovers; its walks and rides can not be recorded in a court circular; it holds no drawing-rooms or levées; it pays no one the honor of a visit, and no one has the honor of being invited to visit it in return. The President of the Confederation is as accessible as a Roman Tribune; he has no guards, no lords in waiting, no gentlemen ushers; you may go to his official quarters with as little ceremony as you may call on a friend in college; the private stranger may knock at the door, and the chief magistrate of the commonwealth bids him to come in. Here is the true commonwealth; here is the true form of executive, an executive which never suppresses a newspaper nor declares a city in a

state of siege. With such an executive as this, all the chief difficulties of other forms of government seem to be got over. A Legislature chosen for a fixed term, which can not be dissolved before the end of that term, chooses an executive council for the term of its own existence. There can be no penal dissolution, no ministerial crisis, where a dissolution and a re-election of ministers take place at a fixed time by the operation of the law. There can be no question of ministerial responsibility, no question of votes of censure, no temptation—the greatest of all temptations in an English parliament—to vote for or against such a motion, not because it is good or bad, but because it may help to keep in or turn out a particular minister. All these dangers are altogether avoided by the relation which the Swiss Constitution establishes between the Legislative Assembly and the Executive Council. The members of the Federal Council can not vote in either house of the Assembly, but they may attend and speak in either. The Swiss Assembly therefore has, what the American Congress has not, the advantage of a direct ministerial explanation; while that ministerial explanation can not be, as it may be in England, mixed up with fears of votes of censure on one side, or of a penal dissolution on the other. Here is, to my mind at least, the most perfect political system which the wit of man has yet devised. I am far from approving of much that has of late been done in Switzerland in the way of what I can not but call religious persecution. I can not but look with fear and trembling on some of the changes made by the late constitutional revision. But none of these points touch the relations between the legislature and the executive, which seem to me to be, both in theory and practice, the happiest which have ever been devised. The institutions of one country can never be transplanted wholesale into another: and, as I have before said, Switzerland has the greatest of all advantages in that her republican forms have not been set up in the place of some other forms, but have grown up along with the nation itself. Still such a model may surely supply hints. It surely supplies the most important hint of all, that a commonwealth should not place itself at the mercy of one man, least of all the mercy of a man whose training has been, not that of the senate house, but of the camp. Our own age has indeed seen a Cavaignac, but Cæsars and Buonapartes are characters far more common. The details of a system which suits Switzerland would most likely not suit France or Spain, for the simple reason, that France and Spain are France and Spain and not Switzerland. Each country, if it wishes to legislate wisely, must legislate for its own needs, according to the habits and feelings of its own people. But the general lesson

is surely one which may be weighed and followed. The Swiss system avoids the danger which besets the French Republic of 1875, as it beset the French Republic of 1848. It opens no path for the chief magistrate of a commonwealth to march along to a tyranny. If the nature of the French people is such that they would despise so simple and homely a form of executive as the Swiss Council, if they can not do without something of the gewgaws and trappings of a personal ruler, such a taste shows that they are unfit for republican institutions at all; they had better call back one of the sons of Saint Lewis, and have a real king rather than a sham president.

Such are the difficulties against which real republican principles have to struggle in those countries of Europe in which attempts at founding republics have been made on the greatest scale. These attempts have failed, partly because they have begun at the wrong end, partly because men have been honestly unable to set themselves free from the inapplicable traditions of a kingly form of government, partly because men have dishonestly tried to make the name and forms of a republic serve as tools to compass other purposes of their own. That republican movements have failed under such hindrances proves nothing whatever against republican institutions in the abstract; at most it proves that those particular countries are not fit for republican institutions. This is most to be regretted, because in one way the circumstances both of France and Spain seemed favorable for the republican experiment. In both cases the republic in a manner came of itself. In France a tyranny fell in pieces; in Spain an elected king gave up the hard task of reigning. And in both cases there was one favorable sign. The cry for Federalism in Spain, might not be in every sense appropriate, but it was not the ridiculous cry which it seemed to shallow sneerers in England. It was a protest against the over-meddling of central governments, whether kingly or republican. So far it was healthy. And any one who read the French local papers in the year before the fall of the Tyranny would see that there was a strong spirit abroad in favor of freer and more healthy local institutions. This last reform can be made, whatever may be the form of the national executive: the experience of England alone shows that a monarchy can get on without being represented by prefects. But whoever gets rid of prefects will have taken the first step toward making a real republic possible. A king without prefects is better than a president with prefects; a king, I am inclined to say, is in any case better than a marshal. But a king without prefects might perhaps some day lead to the *euthanasia* of kingship before a system better than them all.

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